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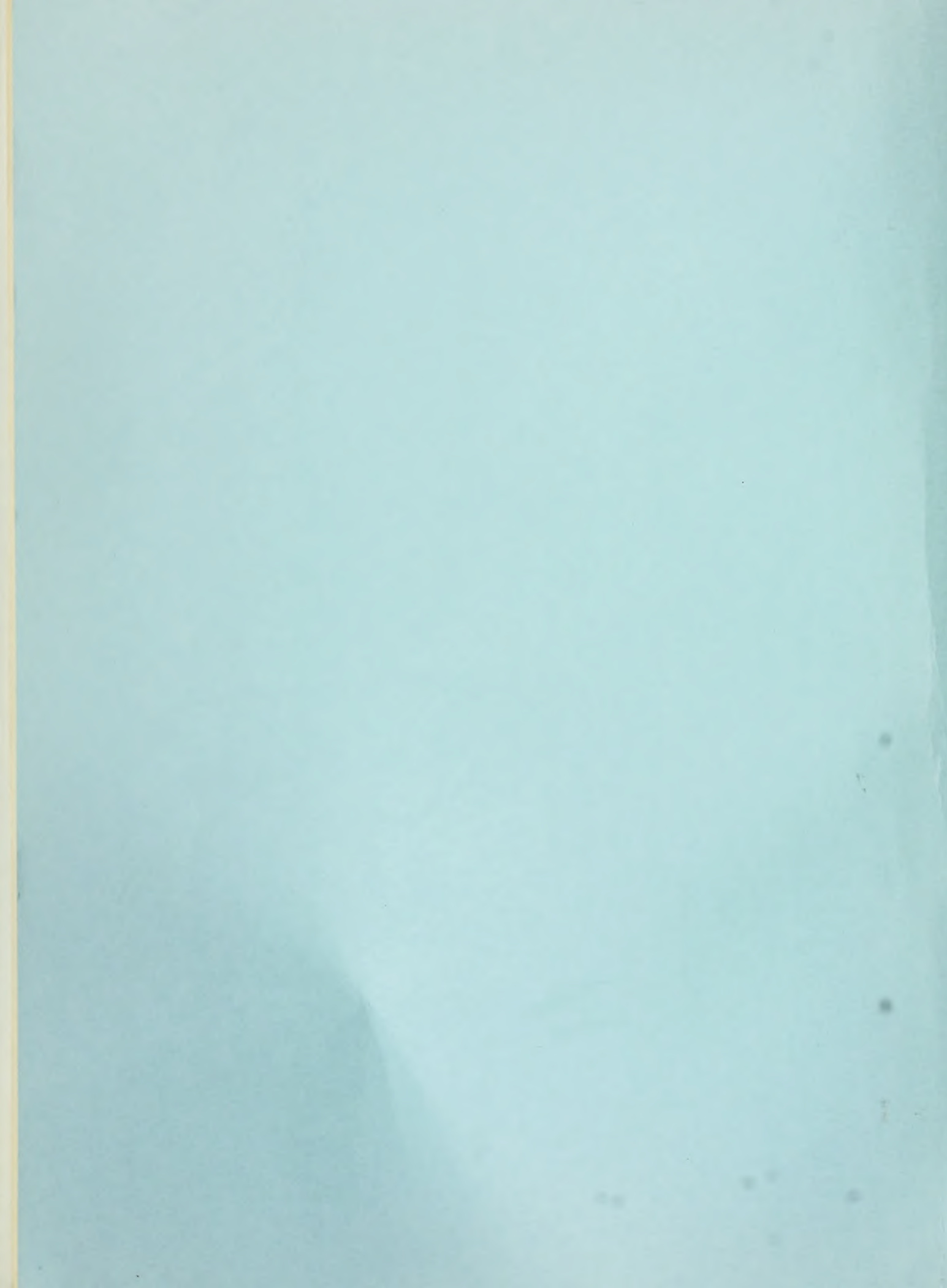
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No. 22444

JUN 19 1968

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

3480

v. 3480

DANIEL H. DEUTSCH, EVELYN M. DEUTSCH, ALFRED
DEUTSCH, BERNICE DEUTSCH, WILLIAM DRELL,
ETHEL DRELL,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANTS' OPENING BRIEF.

DERMOT R. LONG,

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Attorney for Appellants.

FILED

MAY 31 1968

WM. B. LUCK, CLERK



TOPICAL INDEX

| | Page |
|----------------------------------|------|
| Statement of the Pleadings | 1 |
| Statement of the Facts | 3 |
| Specification of Error | 7 |

I.

| | |
|--|---|
| <p>The Court Should Have Determined That the Intent of the Parties, as Proven by Subsequent Performance of All Parties, Was That the Contract of January 3, 1959, Was Controlling as to the Basis of the Stock in the Hands of the Appellants. There Was an Offer, an Acceptance, and Later Performance. The Court Should Have Recognized That All Parties at Time of Contract Recognized the Fact That Delivery of Certificates Would Be Restrained for One Year and a Condition Subsequent Was Imposed That in the Event of Non-Delivery in Five Years, That the Petitioners Could Revert to Their Then Status in Regards a Claim for Accrued Salaries</p> | 7 |
|--|---|

TABLE OF AUTHORITIES CITED

| Cases | Page |
|---|------|
| Argo v. CIR, 150 F.2d 67 | 9 |
| Balanovski v. Comm., 236 F.2d 298 | 10 |
| CIR v. Griffith, 103 F.2d 110 | 9 |
| CIR v. Tying, 106 F.2d 55 | 10 |
| California So. Hotel v. Callendar, 94 Cal. 120 | 9 |
| Capalain v. L.A. Wrecking, 37 Cal.App.2d 527 | 10 |
| Comm. v. Timmer, 78 F.2d 599 | 11 |
| Cooley v. CIR, 33 T.C. 223 | 10 |
| Eastern Coal Corp. v. Yoke, 66 F.Supp. 166 | 9 |
| Fred C. Hall, 194 F.2d 538 | 11 |
| Harold E. MacDonald v. Comm., 230 F.2d 534 | 10 |
| Heiner v. Gwynne, 114 F.2d 723 | 11 |
| Helvering v. Savage, 297 U.S. 106 | 10 |
| Hobson, Arthur L., Estate of, 17 T.C. 854 | 8 |
| Jean v. Jean, 207 Cal.App. 115 | 9 |
| Kirkland v. Levin, 63 Cal.App. 589 | 9 |
| La Motte T. Cohn, 87 T.C. 796 | 8 |
| Lee v. Comm., 143 F.2d 4 | 10 |
| McNamara v. Comm., 210 F.2d 505 | 9 |
| Meyer and Heller v. Romona Village, 5 Cal.App.2d 679 | 9 |
| People v. Seymour, 54 Cal.App.2d 527 | 10 |
| Phil Kalech v. CIR, 23 T.C. 672 | 10 |
| Robbins v. Pacific Eastern Corp., 65 P.2d 42 | 8 |
| Regulations | |
| Income Tax Regulations, Sec. 1.451-2(a) | 7 |

No. 22444

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DANIEL H. DEUTSCH, EVELYN M. DEUTSCH, ALFRED
DEUTSCH, BERNICE DEUTSCH, WILLIAM DRELL,
ETHEL DRELL,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANTS' OPENING BRIEF.

Statement of the Pleadings.

The three docketed cases have been consolidated because the same facts and legal issues are controlling in each case for the years involved.

The only question is whether the stock received by the Appellants for accrued salaries is to have a basis of \$1.00 per share, as per contract of January 3, 1959, by and between the Corporation and Appellants, or is it to have a basis of \$8.00 per share as per the fair market value of the certificates at time of receipt by Appellants May 5, 1960. Appellants file on a calendar year basis.

Daniel H. and Evelyn M. Deutsch.

The Commissioner charged that the stock received by Appellants should have a basis of \$8.00 per share as cost basis, rather than \$1.00 per share as reported and

assessed a deficiency for the year of 1960 in the sum of \$45,016.13, and then per said audit allowed an over-assessment for the year of 1961 in the sum of \$5,-836.78.

William and Ethel Drell.

The Commissioner charged that the stock received by Appellants should have a basis of \$8.00 per share as Cost Basis rather than the \$1.00 per share as reported and assessed a deficiency for 1960 in the sum of \$28,-695.09 and then per said audit allowed an overassessment for the year of 1961 in the sum of \$5,294.00.

Alfred and Bernice Deutsch.

The Commissioner charged that the stock received by Appellants should have a basis of \$8.00 per share as Cost Basis rather than the \$1.00 per share as reported and assessed a deficiency for 1960 in the sum of \$23,-046.13 and per said audit allowed an overassessment for the year of 1961 in the um of \$5,551.46.

By amendment to their answer the Respondents in the alternative claimed an increased deficiency of \$24,-416.05 for the calendar year of 1960 due to Alfred's receipt of the shares, as trustee, to be delivered to Malin.

The issue for decision is whether each group of Appellants realized income in the calendar year 1960 in the amount of the fair market value of each share at \$8.00 per share, or conversely, did each group of appellants constructively receive or actually become the owners of said stock in 1959 by reason of their contract with the Corporation under date of January 3, 1959. The Appellants do not contest the fact that the shares should have been reported in 1959 rather than 1960 at \$1.00 per share, but the tax effect is nil.

Trial of issue in Tax Court of Los Angeles, California, within appeal jurisdiction of United States Ninth Circuit Court of Appeals and judgment in accordance with above provisions rendered on August 21, 1967. Appeal filed by all Appellants for review and reversal of Tax Court's decision, pursuant to pertinent Federal Rules of Procedure.

Statement of the Facts.

All Appellants used the cash basis and reported on calendar year status. At time of filing, all returns were joint returns by the respective husbands and wives.

Alfred Deutsch, Daniel Deutsch and William Drell (hereinafter referred to by their given names) are chemists.

In 1952 they incorporated the Foundation for Biochemical Research as a non-profit corporation. The primary purpose of the Foundation was the preparation and distribution to scientists of biochemicals which were needed in research, but which were not commercially available. The three Appellants were respectively the Secretary-Treasurer, President and Vice President of the Foundation. They were also members of an eight-man Board of Trustees. The other Trustees were prominent or famous men in the field of biochemical research.

In 1958 the Board of Trustees decided that the Foundation should confine its activities to the field of biochemical research and divest itself from all commercial activity. Thus, in March of 1958, the California Corporation for Biochemical Research (hereinafter referred to as Corporation) was incorporated under the laws of California by Alfred, Daniel, and William.

Daniel was President, William was Vice-President, and Alfred was Secretary-Treasurer. During a period of time from 1958 through 1960, Bernard Malin was Treasurer. The Directors were Daniel, William, Alfred, and Bernard.

The Corporation was authorized to issue common stock at \$1.00 per share, and preferred stock at \$100.00 per share which was convertible to common stock, under certain conditions, at the ratio of one hundred shares of common stock for each share of preferred stock.

In March of 1958, the Corporation assumed the operation of the commercial aspects of the Foundation.

In September of 1958, an agreement was entered into between the Foundation and the Corporation whereby the Corporation would receive all the operating assets of the Foundation in exchange for 1920 shares of preferred stock and 116 shares of common stock of said Corporation. On October 24, 1958, both entities executed an "Agreement, Bill of Sale, and Assignment" to carry the September agreement into effect. The assets were valued at \$192,116.72. The agreement was subject to the approval of the California Corporation Commissioner and the Federal Securities and Exchange Commissioner.

On October 23, 1958, the Corporation Commissioner, by permit approved the transaction by required impoundment in escrow of the 1920 preferred shares and 116 common shares until release was authorized by the Corporation Commissioner. Union Bank was designated as Escrow Agent.

The Escrow Agreement provided for release upon approval, but in no event in *less than one year* from com-

mencement of public offering. Escrow began October 28, 1958. Restrictions compatible with Corporation Commissioner were imposed by Securities and Exchange Commission.

As of October, 1958, the Foundation owed the Appellants, as salaries for services rendered, the following amounts:

| | |
|---------|-------------------|
| Daniel | \$9,267.00 |
| Alfred | \$5,443.00 |
| William | \$6,452.00 |
| Total | <hr/> \$21,162.00 |

As of that date, the Appellants discussed with the Board of Trustees the proposition that they would take common stock in lieu of their back salaries at the then fair market value of \$1.00 per share. Appellants and Board of Trustees realized the restrictions imposed and that delivery of stock certificates would be delayed at least one year. The Board of Trustees met, discussed the transaction, and accepted the Appellants' offer. The fair market value of each share of common stock as of that date was \$1.00 per share. This is borne out by the fact that between October 27, 1958 and April 24, 1959 150,000 shares of common stock were sold to the public at \$1.00 per share.

Bernard Malin, attorney and Certified Public Accountant, had also rendered services to the Foundation and was owed fees amounting to \$10,000.00. Malin also wanted stock but his cash position would not allow a cash purchase. The Appellants, after discussion, agreed with Malin to sell him 25% of the stock they received at \$1.00 per share. They discouraged Malin

from attempting to have the Board of Trustees make a similar sale to him. They encouraged him to get cash. This agreement was immediately subsequent to their agreement of January 3, 1959. Upon receipt of the stock in 1960, they performed in good faith and sold Malin 25% of the stock at \$1.00 per share. In addition, they agreed to give Malin 5000 shares of promotional stock that each received (promotional stock not in issue).

The Memo of Agreement of January 3, 1959 (crux of this case) was drafted by Appellants without advice of counsel and reads as follows:

Memo of Agreement.

The undersigned officers hereby agree that they will not request cash payment in satisfaction of the back salaries now owing to them and standing on the books of the Foundation, but will accept in lieu of cash an equal amount of common stock of California Corporation for Biochemical Research as follows:

| | |
|----------------|-----------------|
| Alfred Deutsch | 5443 shs. (sic) |
| Daniel Deutsch | 9267 shs. (sic) |
| William Drell | 6452 shs. (sic) |

They further agree that these shares of stock be transferred to them in due course after the Foundation preferred stock had been released from escrow and converted to common shares, provided that such shares are transferred within five years of this date.

On January 11, 1960 the Corporation filed for release of stock which was approved by Corporation Commissioner on January 20, 1960. Shares were delivered to the Foundation, and by meeting of Board of Trustees

delivered to Appellants on April 7, 1960. Delivery effected May 5 and May 6, 1960. Subsequently 5290 shares were sold to Malin at \$1.00 per share.

At the time of issuance of Certificates the stock had a fair market value of \$8.00 per share.

The Appellants, through error, failed to report the stock at \$1.00 per share as income during 1959. They were unaware of the doctrine of constructive receipt although they did appreciate the fact that they were owners of the shares, pending issuance of the stock. They therefore, as officers of the Foundation, did not record the payment from the Foundation on the Foundation books until 1960. However, the Foundation recognized their right to receipt of the shares at \$1.00 per share and honored it. The Appellants recognized Malin's right to purchase 25% of the stock at \$1.00 per share and honored it. Even though the stock had increased in value, all parties recognized the right of ownership effective as of January 3, 1959.

Specification of Error.

The Court erred in determining that the agreement was not a transfer of a present interest in 1959, but were terms referring to a transfer of interest in the future. The Court ignored the fact that the transaction was a completed transaction, honored by all parties as a transfer of title in 1959. The Court, disregarding the basic equitable doctrine of "substance over form", used an interpretation of the agreement which the Court was aware was written by laymen, to reach a decision based on semantics, all parties recognized that the stock had *been set aside* for Appellants in 1959 and honored the segregation by delivery of certificates when available.

(Section 1.451-2(a), Income Tax Regulations)

The Court further erred in comparing this case with *La Motte T. Cohn*, 8 T.C. 796 (1947). In that case delivery of promotional stock was at issue. In this case the Appellants purchased the stock in 1959, relinquishing their right to accrued salaries as payment. They purchased said stock at the fair market value as of said date. In the event that the stock could never be released, by agreement as a *condition subsequent* could reestablish their claim to accrued salaries. It is interesting to note that in this "laymens'" document, no reference to the Statute of Limitations or waiver of same, is set forth.

The Court disregarded the law set forth in *Robbins v. Pacific Eastern Corporation*, 65 P. 2d 42 (Supp. Ct. —California 1937) that physical delivery of the certificates is not necessary to pass title to stock.

The Court paid no heed to the basic law of contracts that there had been an Offer and Acceptance in 1959 constituting a contract in which all parties as reasonable and prudent men and in recognition of the restrictions existent upon delivery over of certificates, had openly agreed and later performed. If dividends had been declared, they would have been held to the credit of the Appellants (*Estate of Arthur L. Hobson* (1951), 17 T.C. 854). The Court, in reliance on the restrictions, stated that the transfer was only an attempted transfer or a promise to transfer in the future. The Court failed to note that there actually can be a transfer of title by contract even though the purchaser would have the right of rescission of said contract on the basis that a violation of Corporation Codes had occurred. However, this would be a personal right and unless invoked would not bar passage of title. In the instant case, this right

was not invoked and title to the stock passed to Appellants in 1959.

The substance of a transaction in which a taxpayer engaged, rather than the form of the transaction, is controlling in determining income for purposes of taxation.

CIR v. Griffiths, C.C.A. 1939, 103 F. 2d 110;

Argo v. CIR, C.C.A. A1 1945, 150 F. 2d 67.

Taxation is an immensely practical matter and the substance of the thing done, and not the form it took, must govern, as regards liability for income tax.

Eastern Coal Corporation v. Yoke, DCW-Va. 1946, 66 F. Supp. 166.

It has been held in option situations that the employee received income when he received the option, rather than when he exercised it.

McNamara v. CIR, 210 F. 2d 505.

The shares of stock are the substance, not the certificates. That is merely the muniment of title or evidence of ownership, it is not the property in the real sense.

Kirkland v. Levin, 63 Cal. App. 589;

Jean v. Jean, 207 Cal. App. 115.

A person may own an interest in the capital stock of a corporation although the certificates are never issued to him.

Meyer & Heller v. Ramona Village, 5 Cal. App. 2d 679;

California So. Hotel v. Callendar, 94 Cal. 120.

In the instant case the Appellants by purchase of the stock in 1959 not only acquired the right to ownership and dividends, but also assumed the Risk of Loss in the

event of failure of the Corporation. Risk of Loss and Declination of Values follows ownership.

People v. Seymour, 54 Cal. App. 2d 527;

Caplain v. L.A. Wrecking, 37 Cal. App. 2d 527;

CIR v. Tying, 106 F. 2d 55 (C.A. 2—1939).

In *Lee v. Comm.*, 143 F. 2d 4 (C.A. 7—1944) the Court held that if the circumstances indicate that the parties intended an immediate sale, the transaction should be construed as a present sale even though seller retained legal title and possession of the property.

In *Balnovski v. Comm.*, 236 F. 2d 298 (C.A. 2—1956) the Court held that when title passes depends upon the intentions of the parties.

In the case of *Harold E. MacDonald v. Comm.*, 230 F. 2d 534, petitioner received a discounted option in 1948 for 10,000 shares. The stock was sold in 1949 when obtained through exercise of option. Commissioner took the position of income between discounted option price and sales proceeds in 1949, negating capital gains treatment. The Court said MacDonald had income in 1948 between the fair market value of the option and the price he paid for it. The holding period was at time of receipt of option and recognized the contract.

In the case at bar, the Appellants recognized the value at \$1.00 and sold 25% to Malin at said price. This was the fair market value at time of contracting. The Court properly held that the basis to Malin was \$1.00 under the doctrines set forth in

Phil Kalech, 23 T.C. 672;

Cooley, 23 T.C. 223;

Helvering & Savage, 297 U.S. 106.

The Court erred in quoting as comparison the case of *Fred C. Hall*, 15 T.C. 195, 194 F. 2d 538. In that case the certificates were issued, signed and returned to employer. The redelivery at certain dates were subject to satisfactory services being performed in the interim as a *condition precedent* to said redelivery. In this case, the services had been performed, the salaries accrued, and an actual purchase of the stock effected by Appellants by cancellation of claim for accrued salaries. The right to re-establish claim for salaries was a *condition subsequent* in the event of impossibility of delivery of certificates.

In *Heiner v. Gwynne*, 114 F. 2d 723 the Court held that a restriction on sale or possession of stock certificates does not necessarily, negate proof of its fair market value at time of contract even though it may limit the number of prospective purchasers. The equitable and beneficial interest is in the buyer even though he does not have physical possession of the certificate.

In *Comm. v. Timmer*, 78 F. 2d 599, some employees were to receive stock after reorganization of the corporation. This agreement was reached in 1920. The Corporation was never reorganized and they never received their stock. The employees sold their *equitable interest* to the majority stockholders in 1925. The Court held that the fair market value as of 1920 was the base for determining capital gains, it was not earned income when received in 1925.

In the present case the Court is in direct conflict by its attempt to divide the contract, its intent, purpose and performance. It recognizes the contract as to the 25% allocable to Malin but denies recognition for the 75% to Appellants. The cases cited above all establish

the facts that the fair market value of the stock is the basis at time of making of the contract as recognized by the parties involved. It is their intent that controls, as supported by the basic law of Contracts. In this case the Appellants were subject to approval of the contract by the Board of Trustees. All parties approved and performed that contract and the Appellants performed their contract which was incidental and collateral to their contract with the Foundation. What more definite proof can one present than agreement and performance by all persons concerned.

Taxation is necessary for preservation and operation of any nation. Taxation must be fair. Unfair taxation without representation was the very basis for establishment of this nation. To allow a taxing agency to engage in legalistic semantics to avoid recognition of a fair and equitable contractual relationship is unfair taxation.

Therefore, the Appellants contend that the contract of January 3, 1959 controls and that the fair market value of that date (\$1.00) is the proper Cost Basis of said stock.

The Appellants respectfully request this Honorable Court to reverse the Tax Court's decision as to the shares allocable to them and determine their cost at \$1.00 per share.

Respectfully submitted,

DERMOT R. LONG,

Attorney for Appellants.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

DERMOT R. LONG

JUL 1 1968
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL H. DEUTSCH and EVELYN M. DEUTSCH, Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ALFRED DEUTSCH and BERNICE DEUTSCH, Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

WILLIAM DRELL and ETHEL DRELL, Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ON PETITION FOR REVIEW OF THE DECISIONS OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

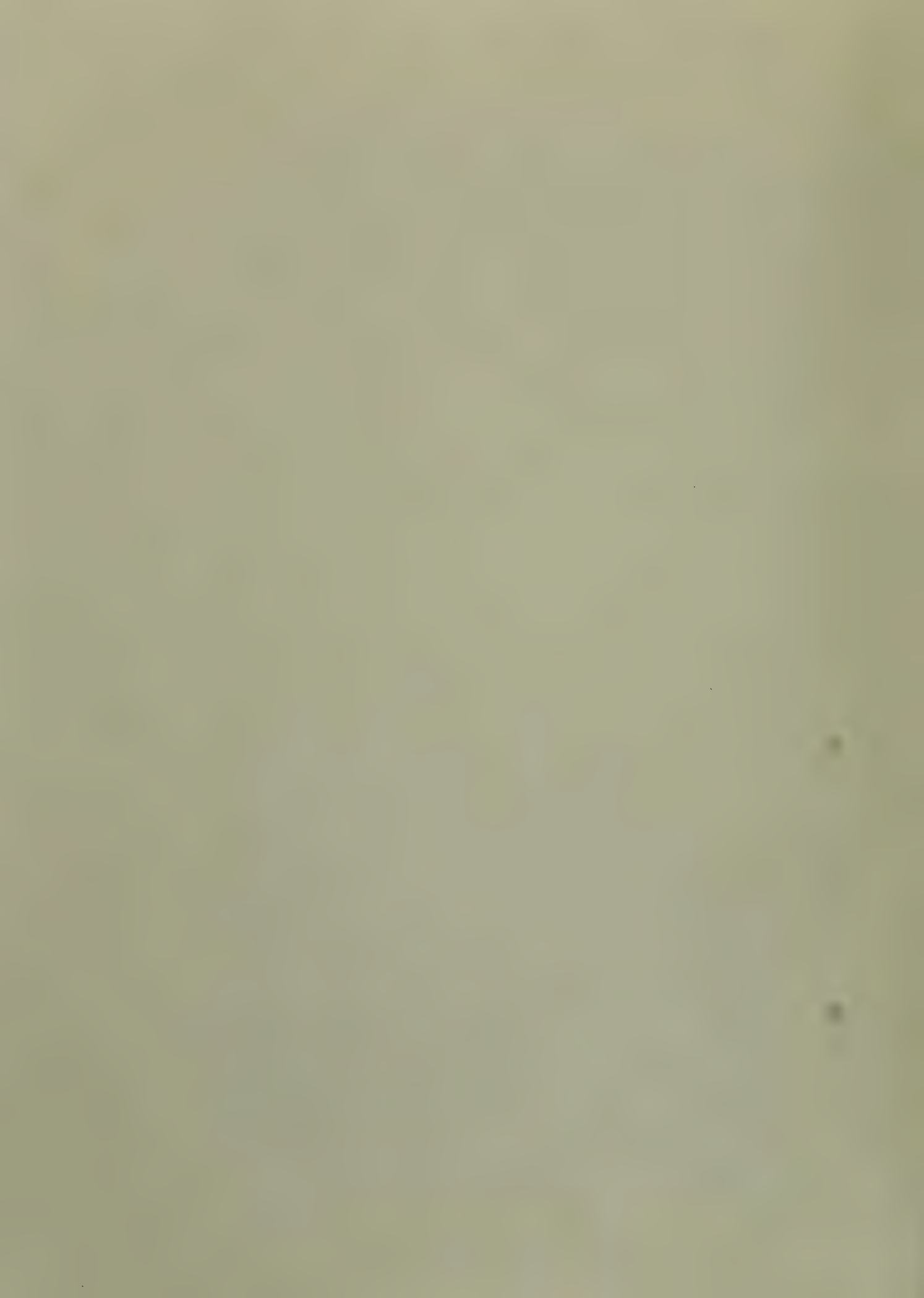
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JUL 1 1968

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I N D E X

| | Page |
|--|------|
| Opinion below----- | 1 |
| Jurisdiction----- | 1 |
| Question presented----- | 2 |
| Statutes and Regulations involved----- | 3 |
| Statement----- | 4 |
| Summary of argument----- | 14 |
| Argument: | |

The Tax Court correctly held that the value of stock was includible in taxpayers' income in 1960, when the stock was unconditionally received, rather than in 1959, when the stock had not yet been issued to taxpayers and was held in escrow for the benefit of taxpayers' employer-----

15

| | |
|-----------------|----|
| Conclusion----- | 24 |
|-----------------|----|

CITATIONS

Cases:

| | |
|---|----|
| <u>Cohu v. Commissioner</u> , 8 T.C. 796----- | 21 |
| <u>Hall v. Commissioner</u> , 15 T.C. 195, affirmed <u>per curiam</u> , 194 F. 2d 538----- | 22 |
| <u>Hedrick v. Commissioner</u> , 154 F. 2d 90, certiorari denied, 329 U.S. 719----- | 17 |
| <u>Hobson, Estate of v. Commissioner</u> , 17 T.C. 854----- | 23 |
| <u>Newmark v. Commissioner</u> , 311 F. 2d 913----- | 17 |
| <u>Robbins v. Pacific Eastern Corp.</u> , 65 P. 2d 42----- | 22 |

Statutes:

| | |
|--|-------|
| Corporations Code, 25 West's Annotated California Codes, Sec. 25,508----- | 19 |
| Internal Revenue Code of 1954: | |
| Sec. 61 (26 U.S.C. 1964 ed., Sec. 61)----- | 3, 17 |
| Sec. 446 (26 U.S.C. 1964 ed., Sec. 446)----- | 17 |
| Sec. 451 (26 U.S.C. 1964 ed., Sec. 451)----- | 3, 16 |

Miscellaneous:

| | |
|--|-------|
| 2 Mertens, Law of Federal Income Taxation (Rev.): | |
| Sec. 11.01----- | 17 |
| Sec. 11.03----- | 17 |
| Sec. 11.08----- | 17 |
| Treasury Regulations on Income Tax, Sec. 1.451-2 (26 C.F.R., Sec. 1.451-2)----- | 3, 16 |

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,444

DANIEL H. DEUTSCH and EVELYN M. DEUTSCH, Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ALFRED DEUTSCH and BERNICE DEUTSCH, Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

WILLIAM DRELL and ETHEL DRELL, Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ON PETITION FOR REVIEW OF THE DECISIONS OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (I-R.
92-111) are not officially reported.

JURISDICTION

This petition for review (I-R. 130-133) involves federal income taxes for the calendar years 1960 and 1961. On October 6, 1964, the Commissioner of Internal Revenue mailed to the taxpayers notices of deficiency asserting a deficiency against Dr. and Mrs. Daniel Deutsch for the taxable year ended December 31, 1960, in the amount of \$45,016.13 and an overassessment for the taxable year

ended December 31, 1961, in the amount of \$5,336.78 (I-R. 13-17); a deficiency against Dr. and Mrs. Alfred Deutsch for the taxable year ended December 31, 1960, in the amount of \$23,046.13 and an overassessment for the taxable year ended December 31, 1961, in the amount of \$5,551.46 (I-R. 34-38); and a deficiency against Dr. and Mrs. William Drell for the taxable year ended December 31, 1960, in the amount of \$28,695.09 and an overassessment for the taxable year ended December 31, 1961, in the amount of \$5,294 (I-R. 56-60). Within 90 days thereafter, on January 4, 1965, taxpayers petitioned the Tax Court for a redetermination of the deficiencies and the overassessments asserted for the taxable years 1960 and 1961 under the provisions of Section 6213 of the Internal Revenue Code of 1954. (I-R. 1-18, 22-39, 44-61.) On November 8, 1966, a joint motion to consolidate for trial and briefing was granted. (I-R. 87-88.) The decisions of the Tax Court were entered on August 21, 1967. (I-R. 117, 123, 129.) These cases are brought to this Court by a petition for review filed on October 16, 1967 (I-R. 130-133), within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTION PRESENTED

Whether the Tax Court correctly held that the value of stock was includible in taxpayers' income in 1960, when the stock was unconditionally received, rather than in 1959, when the stock had not yet been issued to taxpayers and was held in escrow for the benefit of taxpayers' employer.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) General Definition.--Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

* * * *

(26 U.S.C. 1964 ed., Sec. 61.)

SEC. 451. GENERAL RULE FOR TAXABLE YEAR OF INCLUSION.

(a) General Rule.--The amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for as of a different period.

* * * *

(26 U.S.C. 1964 ed., Sec. 451.)

Treasury Regulations on Income Tax (1954 Code):

§ 1.451-2 Constructive receipt of income.

(a) General rule. Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions. Thus, if a corporation credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt. * * *

* * * *

(26 C.F.R., Sec. 1.451-2.)

STATEMENT

The facts, as stipulated by the parties (I-R. 76-86) and as found by the Tax Court (I-R. 93-104), may be summarized as follows:

Daniel H. and Evelyn M. Deutsch, husband and wife, Alfred and Bernice Deutsch, husband and wife, and William and Ethel Drell, husband and wife, resided in Pasadena, California, at the time of the filing of their petitions in this case and filed their joint returns for the calendar year 1960 with the District Director of Internal Revenue at Los Angeles, California. The cash basis of accounting was used in computing the income reported by the parties on their federal income tax returns. (I-R. 93-94; II-R. 16, Exs. 1-A, 2-B, 3-C.)

In 1952, Alfred Deutsch, Daniel H. Deutsch, and William Drell (hereinafter referred to collectively as "taxpayers" or individually by their given names), chemists by profession, formed a nonprofit California corporation called the Foundation for Biochemical Research (hereinafter referred to as "the Foundation"). Taxpayers were officers of the Foundation and members of its eight-member board of trustees. The Foundation engaged in both research and commercial activities. (I-R. 94.)

In 1958, the Foundation's board of trustees decided to form a separate corporation to assume the Foundation's commercial activities. Accordingly, in March, 1958, the California Corporation for Biochemical Research (hereinafter referred to as "the Corporation")

was incorporated under the laws of California by the taxpayers to take over the commercial activities of the Foundation, thereby engaging in the manufacture and sale of biochemicals. In the same month, the Corporation assumed operation of the Foundation's commercial activities on behalf of the Foundation. Taxpayers were officers and directors of the newly-formed Corporation, and one Bernard Malin was the Corporation's treasurer from its inception to 1960 and a director for a portion of this period. The Corporation was authorized to issue common stock (par value \$1) and preferred stock (par value \$100). The preferred stock was convertible to common stock at the ratio of one share of preferred stock for 100 shares of common stock. (I-R. 94-95; II-R. 22.)

In September, 1958, an agreement was entered into between the Foundation and the Corporation whereby all of the operating assets of the Foundation were to be transferred to the Corporation in exchange for 1,920 shares of preferred stock of the Corporation and 116 shares of common stock of the Corporation. Thereafter, the Corporation filed an application with the Commissioner of Corporations of the State of California (hereinafter referred to as the "Corporation Commissioner") requesting, among other things, (1) permission to sell and issue to the Foundation 1,920 shares of preferred stock and 116 shares of common stock, (2) permission to sell 150,000 shares of common stock to the public, and (3) permission to issue 150,116 shares of common stock to Daniel, William, and Alfred, the promoters of the Corporation.^{1/} This application contemplated that

^{1/} Apparently it was necessary that the preferred stock issued to the Foundation be converted to common stock before the common stock could be issued to the promoters.

the Foundation's shares would be issued and placed in escrow prior to the sale of any shares to the public and prior to the issuance of any promotional shares. (I-R. 80-81, 95-96.)

As a condition for authorizing the issuance of stock by the Corporation (and for authorizing sale to the public of 150,000 shares of common stock), the Corporation Commissioner imposed certain restrictions upon the shares to be issued to the Foundation and to the promoters, which restrictions were set forth in a permit dated October 23, 1958, authorizing the issuance and public sale of the stock. (I-R. 81, 96; II-R. 16, Ex. 8-H.)

The permit provided for the issuance by the Corporation to the Foundation of 1,920 of its preferred shares and 116 of its common shares in payment for the assets of the Foundation transferred to the Corporation and for the conversion of the preferred shares to common shares on a basis of 100 shares of common for one share of preferred with the following restrictions and conditions (I-R. 96-97; Ex. 8-H):

(b) That none of the shares authorized * * * [to be issued to the Foundation and the promoters] shall be sold or issued unless and until applicant shall have selected an escrow holder and said escrow holder shall have been first approved in writing by the Commissioner of Corporations; that, when issued, all certificates evidencing any of said shares shall be forthwith deposited with said escrow holder, to be held as an escrow pending the further written order of the said Commissioner; that the receipt of said escrow holder for said certificates shall be filed with said Commissioner; and that any owner or person entitled to said shares shall not consummate a sale or transfer of said shares, or any interest therein, or receive any consideration therefor, until the written consent of said Commissioner shall have been obtained so to do.

The permit placed additional restrictions upon the sale of the stock which was to be issued to the promoters. (I-R. 97.)

The Corporation designated the Union Bank of Los Angeles as escrow holder for the shares to be issued to the Foundation and to the promoters pursuant to the permit, and on October 23, 1958, the Corporation Commissioner approved such designation.

(I-R. 82, 97; II-R. 16, Ex. 9-I.) The escrow agreement provided for release of the stock placed in escrow upon application for such release to and authorization for such release by the Corporation Commissioner and, if a public offering of the stock were made, in no event in less than one year from the commencement of the public offering. (I-R. 97.)

On October 24, 1958, having made the foregoing arrangements, the Foundation and the Corporation executed an "Agreement, Bill of Sale and Assignment" by which the Foundation transferred assets valued at \$192,116.72 to the Corporation. In consideration for the assets transferred by the Foundation, the Corporation issued 1,920 shares of convertible preferred stock and 116 shares of common stock, the certificates of which were placed in escrow. (I-R. 79-80, 95-96; II-R. 16, Ex. 7-G.) Accordingly, on October 28, 1958, the Corporation placed in escrow 1,920 shares of preferred and 116 shares of common stock to be held for the Foundation in accordance with the escrow agreement and subject to the restrictions set forth in the permit. (I-R. 82-83, 97-98.)

Between October 27, 1958, and April 24, 1959, 150,000 shares of the common stock of the Corporation were sold to the public at \$1 per share. These 150,000 shares constituted all of the stock authorized by the Corporation Commissioner to be sold to the public. (I-R. 83, 98.)

In October, 1958, the Foundation owed taxpayers the following amounts representing salaries for services previously performed as officers of the Foundation dating as far back as 1953 (I-R. 98, 101):

| | |
|----------------|--------------|
| Alfred Deutsch | \$5,443 |
| Daniel Deutsch | 9,267 |
| William Drell | <u>6,452</u> |
| Total | \$21,162 |

Subsequent to October, 1958, and until sometime in 1960 the Foundation continued to accrue additional salaries payable to the taxpayers. (I-R. 98.)

In October and November, 1958, taxpayers discussed with the other trustees of the Foundation taking some of the stock of the Corporation issued or to be issued to the Foundation as satisfaction for the back salaries due them at the rate of \$1 per share of common stock. At the time of these discussions taxpayers and the other trustees were all aware that it would be at least a year and perhaps longer before the preferred stock could be released from the escrow agreement and converted to common stock. They and the other trustees were aware of the restrictions placed on

the issuance and sale of the stock by the Corporation Commissioner in granting the permit to issue the stock. Sometime late in 1958 or early in 1959 taxpayers and the other trustees of the Foundation reached an agreement with respect to transfers of stock of the Corporation to taxpayers for back salaries. (I-R. 98-99.)^{2/}

This agreement among Alfred, Daniel, and William, and the other trustees of the Foundation with respect to the back salaries due taxpayers by the Foundation was reduced to writing on January 3, 1959, and signed by Alfred, Daniel, and William only. The instrument was entitled "Memo of Agreement" and read as follows (I-R. 84-85, 100; II-R. 16, Ex. 13-M):

2/ Bernard Malin (hereinafter referred to as "Malin") is an attorney and a certified public accountant. He had done some work for the Foundation, and in October, 1958, the Foundation owed him approximately \$10,000. Malin suggested to Alfred that he be paid in stock. Alfred discouraged bringing this proposition before the board of trustees of the Foundation. Later Alfred, Daniel, and William discussed with Malin the sale to him of a portion of the stock they were considering taking in payment of back salaries owed to them by the Foundation. At the time of these discussions Malin could have purchased stock from the public offering at \$1 a share but did not have funds immediately available for the purchase of such shares partially because of not having received payment from the Foundation for the amount of fees owing to him. Malin was at the time doing work for the Corporation, and Alfred, Daniel, and William were desirous of having Malin continue working for the Corporation and of having him have a financial interest in the Corporation. In January, 1959, taxpayers entered into an agreement with Malin to sell him at \$1 per share one-fourth of the 21,162 shares of stock which was the aggregate amount to be transferred to them by the Foundation for back salaries. To provide the 5,290 shares to be sold to Malin, taxpayers agreed among themselves that Daniel and William would each sell Malin the shares due them by the Corporation in excess of 5,291 and Alfred would sell to Malin the shares due him in excess of 5,290 shares. (I-R. 99-100.)

The undersigned officers hereby agree that they will not request cash payment in satisfaction of the back salaries now owing to them and standing on the books of the Foundation, but will accept in lieu of cash an equal amount of common stock of Calif. Corp. for Biochemical Research as follows:

| | |
|-------------------|------------|
| Alfred Deutsch | 5,443 shs. |
| Daniel H. Deutsch | 9,267 shs. |
| William Drell | 6,452 shs. |

They further agree that these shares of stock be transferred to them in due course after the Foundation preferred stock has been released from escrow and converted to common shares, provided that such shares are transferred within 5 years of this date.

On January 11, 1960, the Corporation filed an application with the Corporation Commissioner to withdraw from escrow the 1,920 shares of preferred stock and 116 shares of common stock held for the Foundation. The Corporation Commissioner on January 22, 1960,^{3/} issued an order partially terminating the escrow, which order constituted his consent to the withdrawal of 1,920 preferred and 116 common shares. These shares were delivered to the Foundation, and on February 15, 1960, the Foundation caused 242 shares of preferred stock to be converted into 24,200 shares of common stock. This was accomplished by having the Corporation cancel the 242 preferred shares and issue the 24,200 common shares to the Foundation. (I-R. 83-84, 101; II-R. 16, Exs. 10-J, 11-K.) The minutes of the meeting of the board of trustees of the Foundation

^{3/} The Tax Court findings (I-R. 101) erroneously set forth the date of the order as January 20, 1960. (See I-R. 107; II-R. 16, Ex. 11-K.)

held March 24, 1960, contained the following statement and resolution with respect to these shares (I-R. 101):

TRANSFER OF STOCK:

The Board ~~of~~ [sic] discussed the agreement made on January 3, 1959 whereby 21,162 shares of Common Stock, then valued at approximately \$1.00 per share, were to be exchanged for a like amount of back salaries accumulated on the books of the Foundation since 1953. The Board was in agreement that this arrangement was properly entered into and after due consideration the following resolution was unanimously adopted:

RESOLVED, THAT the Officers be instructed to confer with Counsel with the view towards implementing as expeditiously [sic] as possible the memo of agreement, dated January 3, 1959.

On April 7, 1960, the Foundation endorsed certificates representing 21,162 shares of common stock of the Corporation and delivered those certificates to the taxpayers. ^{4/} (I-R. 84, 101.)

4/ The taxpayers had decided that to facilitate the sale to Malin of the stock which they had previously agreed to sell him, the new certificate for the 5,290 shares to be sold to him would be issued by the Corporation in Alfred's name. Accordingly, the books and records of the Corporation indicate that on May 5 and 6, 1960, new certificates were issued by the Corporation to the taxpayers as follows:

| | |
|----------------|--------------|
| Alfred Deutsch | 10,580 |
| Daniel Deutsch | 5,291 |
| William Drell | <u>5,291</u> |
| | 21,162 |

During 1960, but subsequent to May of that year, Alfred transferred 5,290 of the shares issued by the Corporation to him in May to Malin, who paid him \$5,290 therefor, which amount was divided among taxpayers on the basis of the number of shares each had agreed to sell to Malin. (I-R. 84, 101-102; II-R. 16, Ex. 12-L.)

At all times between October 15, 1959, and May 30, 1960, the fair market value of the common stock of the Corporation was \$8 per share. (I-R. 85, 102.)

Taxpayers did not report any income on their income tax returns for the calendar year 1959 with respect to the 21,162 shares of stock which were the subject of the January 3, 1959, agreement. Each taxpayer on his federal income tax return for the calendar year 1961 reported capital gain from sales of stock of the Corporation which was stated to have been acquired on April 7, 1960. The stock sold by each taxpayer in 1961 was stock received from the Foundation pursuant to the agreement of January 3, 1959. (I-R. 85-86, 102.)

A document submitted to the Corporation Commissioner by the Corporation, entitled "Offering Circular" and dated April 27, 1961, contained the statement that "during 1960 the three directors of the Corporation, who are also three of eight trustees of the Foundation, received accrued officers' salaries due from the Foundation in the form of 21,162 shares of common stock of the Corporation." Moreover, the accrued salaries payable to taxpayers remained as liabilities on the books and records of the Foundation until April 30, 1960, at which time an adjusting entry was made reflecting payment by a distribution of 21,162 shares of stock of the Corporation then held in the Foundation's investment account. Each taxpayer on his federal income tax return for the calendar year 1960, which was

prepared by the accountant Malin, reported an amount as income from salary attributable to the receipt of the stock from the Foundation. The amount reported by each was as follows:

| | <u>Stock (at \$1 Per Share)</u> | <u>Tax Withheld</u> | <u>Total</u> |
|---------|-------------------------------------|-------------------------|-----------------|
| Alfred | \$ 5,443.00 | \$1,268.00 | \$ 6,711.00 |
| Daniel | 9,267.00 | 1,600.00 | 10,867.00 |
| William | <u>6,452.00</u> | <u>1,450.00</u> | <u>7,902.00</u> |
| | \$21,162.00 | \$4,318.00 | \$25,480.00 |

The amount of withholding represented salaries credited by the Foundation to each taxpayer after October, 1958. (I-R. 85, 103.)

The Commissioner, in his statutory notices of deficiency, claimed that taxpayers should have been taxed on the fair market value of the stock as it existed in 1960, which was subsequently stipulated as being \$8 per share. (I-R. 13-17, 34-38, 56-60, 85, 102 ; II-R. 12.)

The Tax Court has held that the Commissioner's position is correct, and that taxpayers received the stock in 1960, at which time it is includible in their income for that year at \$8 per share. The court reasoned that the 1959 contract, which entitled taxpayers to receive stock in the future, did not convey a present interest to them. With respect to the 5,290 shares which taxpayers sold to Malin, however, the court held that it was

includible in taxpayers' 1960 income at only \$1 a share, "since they were committed to sell it to Malin for that price." (I-R. 104-111.) Taxpayers appealed the Tax Court's decision that 1960 was the year in which they received their stock and should report income in respect thereto. (I-R. 130-135.) The Commissioner decided not to appeal the treatment of the stock sold by taxpayers to Malin.

SUMMARY OF ARGUMENT

Taxpayers are taxable in the year that they received stock as compensation. This case involves the factual question of determining the year during which the stock was received. Taxpayers signed a "Memo of Agreement" in 1959 in which they announced their intention to accept stock in the newly-formed Corporation in satisfaction of accrued salaries due them from their employer, the Foundation. They claim that the signing of this memo constituted receipt of the stock and that it was accordingly received in 1959. However, the Foundation was also to receive stock in the Corporation, and a portion of the Foundation's stock had to be converted from preferred to common before taxpayers could receive any shares. At the time that the memo was executed, the Foundation's shares were held in escrow and could not be released without the consent of the Corporation Commissioner. The Corporation Commissioner's consent was neither sought nor given until 1960. It was only after the shares were released from escrow in 1960 that the Foundation was able to exercise its right to convert the preferred

shares to common and transfer the specified amount of shares to taxpayers. Prior to taxpayers' receipt of the stock in 1960, their right to draw upon the stock was completely restricted. Taxpayers had no control over these restrictions, and the right to sell the shares was not theirs until the stock was received in 1960. We submit that the facts in this case completely substantiate the Tax Court's decision that taxpayers received the stock in 1960 and were accordingly taxable in the amount of its fair market value at that time.

ARGUMENT

THE TAX COURT CORRECTLY HELD THAT THE VALUE OF THE STOCK WAS INCLUDIBLE IN TAXPAYERS' INCOME IN 1960, WHEN THE STOCK WAS UNCONDITIONALLY RECEIVED, RATHER THAN IN 1959, WHEN THE STOCK HAD NOT YET BEEN ISSUED TO TAXPAYERS AND WAS HELD IN ESCROW FOR THE BENEFIT OF TAXPAYERS' EMPLOYER

The issue here is whether taxpayers, who were paid salaries in the form of stock, received the stock in 1959, when it had a fair market value of \$1, or in 1960, when the stock had a fair market value of \$8. The Tax Court held that the facts established that the stock was received in 1960, and, accordingly, was taxable as income in that year. Taxpayers argue a contrary interpretation of the facts which they claim establishes that the stock was received in 1959.

Section 451(a), ^{5/} supra, provides the general rule to be applied for determining the taxable year during which income is to be taxed. The statute provides, in relevant part, "The amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer * * *." Working in mitigation of the requirement of actual receipt for tax liability on the cash basis is the doctrine of constructive receipt. The Regulations describe the concept of constructive receipt as follows (Treasury Regulations on Income Tax (1954 Code), Section 1.451-2(a), supra):

Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions. Thus, if a corporation credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt. * * *

Accordingly, the application of the constructive receipt doctrine is limited to situations where money or property is available to taxpayers without restriction and failure to receive it results from an exercise of taxpayers' own choice under circumstances

^{5/} All references are to the Internal Revenue Code of 1954 unless otherwise noted.

controlled by them. See Newmark v. Commissioner, 311 F. 2d 913 (C.A. 2d 1962); Hedrick v. Commissioner, 154 F. 2d 90 (C.A. 2d 1946), certiorari denied, 329 U.S. 719.

Taxpayers admit that their receipt of stock in satisfaction of services rendered constitutes gross income. See Section 61(a)(1), supra; 2 Mertens, Law of Federal Income Taxation (Rev.), Section 11.01.^{6/} Taxpayers contend only that they received the stock in 1959. This contention is based upon an instrument they signed in 1959 in which taxpayers stated that they would accept shares in the newly-formed Corporation as satisfaction for accrued salaries owed taxpayers by their employer, the Foundation. At the time the instrument was signed, the Foundation did not have a right to the Corporation's shares and was unsure as to when and if it would acquire the shares. It is the Commissioner's position that, as held by the Tax Court, taxpayers did not receive the shares until 1960 when they actually became available to the Foundation and the Foundation was able to pay the shares to taxpayers. Prior to

^{6/} Taxpayers use the cash method of accounting and therefore would not recognize the stock as income prior to "receipt" as might one using another accepted method. See Code Section 446(c). Moreover, taxpayers do not contest the established principle that income received in the form of stock is measured by the fair market value of the stock at the time of receipt. See 2 Mertens, Law of Federal Income Taxation (Rev.), Sections 11.03, 11.08.

1960, taxpayers' right to the stock was not sufficient to subject them to an income tax.

Taxpayers were employed by the Foundation for a period of years, with unpaid salaries accruing in their favor since 1953. On January 3, 1959, shortly after the Corporation was formed to take over the commercial activities of the Foundation, taxpayers signed an instrument entitled "Memo of Agreement". (I-R. 84-85, 98-100, 101; II-R. 16, Ex. 13-M.) In this instrument which was signed by taxpayers only, taxpayers stated they would not request cash payment in satisfaction of past salaries but "will accept", in lieu of cash, common stock of the Corporation. The terms of the instrument did not evidence the transfer of a present interest to taxpayers. Nor may the instrument be interpreted as placing taxpayers in constructive receipt of the stock. The shares were not set apart for taxpayers so as to enable them to draw upon the shares at any time. On the contrary, taxpayers' receipt of the stock was subject to substantial limitations. They were to receive the shares only after the Foundation received corporate stock which was in escrow at the time the "Memo of Agreement" was signed. Thus, the "Memo of Agreement" further provided that taxpayers would receive the stock only "after the Foundation preferred stock has been released from escrow and converted to common shares, provided that such shares are transferred within 5 years of this date."

The Foundation itself had no right to the stock during 1959. The Corporation Commissioner's permit authorizing the newly-formed Corporation to issue stock in return for the Foundation's assets specified that the shares in question could not be issued unless they were deposited with an escrow holder approved by the Corporation Commissioner, that the shares were to be held in escrow until permitted to be released by the written order of the Corporation Commissioner, and that any owner or person entitled to the shares could not consummate a sale or transfer of the shares, or any interest therein, or receive any consideration therefor, until the written consent of the Corporation Commissioner should have been obtained.^{7/} (I-R. 97; II-R. 16, Ex. 8-H.) These limitations were not satisfied until 1960. Accordingly, it was impossible for taxpayers to obtain any rights to the stock in 1959 simply by signing an instrument by which they stated they would accept stock when and if the Foundation was able to transfer it to them.

It was not until January 11, 1960, that the Corporation Commissioner was requested to grant permission to release from escrow the stock to be transferred to the Foundation. The permission was not granted until January 22, 1960, when the Corporation Commissioner issued an order permitting the withdrawal from

^{7/} This restriction was imposed in accordance with the Commissioner's authority under California law. See Corporations Code, 25 West's Annotated California Codes, Sec. 25,508.

escrow of 1,920 preferred shares and 116 common shares and the transfer of these shares to the Corporation. The Foundation had no right to the stock in question until the Corporation Commissioner issued his order. On February 15, 1960, after receiving the shares released from escrow, the Foundation caused 242 shares of preferred stock to be converted by the Corporation into 24,200 shares of common stock. Subsequent to this conversion, the Foundation's board of trustees, meeting on March 24, 1960, formally approved the arrangement whereby 21,162 shares of common stock of the Corporation were to be transferred to taxpayers in satisfaction of "back salaries accumulated on the books of the Foundation since 1953." (I-R. 101.) Thus, prior to 1960, the substantial restrictions upon taxpayers' rights to the shares precluded taxpayers from constructively or actually receiving the shares (as distinguished from the certificates) or the certificates.

The January 3, 1959, "Memo of Agreement" gave taxpayers no greater rights to the stock than those which had been recognized by the previous accounting for the accrued salaries due taxpayers. Accordingly, the accrued salaries payable to taxpayers remained as liabilities on the books and records of the Foundation until April 30, 1960, when an adjusting entry was made to reflect payment by a distribution of 21,162 shares of stock of the Corporation

then held in the Foundation's investment account. And the taxpayers themselves did not report receipt of the stock on their 1959 income tax returns. Moreover, an "Offering Circular" dated April 27, 1961, submitted to the Corporation Commissioner by the Corporation, contained the statement, confirming the Commissioner's position, that "during 1960 the three directors of the Corporation, who are also three of eight trustees of the Foundation, received accrued officers' salaries due from the Foundation in the form of 21,162 shares of common stock of the Corporation." (I-R. 102-103.)

Cohu v. Commissioner, 8 T.C. 796 (1947),^{8/} involved a determination of the effect of contractual restrictions upon the question of the year during which promotional shares were received by and taxable to certain taxpayers. In that case, as in the instant case, the Corporation Commissioner's permit required his approval before the issuance of the stock to taxpayers, and this approval was not given until 1940, one year after taxpayers alleged their constructive receipt. The court concluded that taxpayers' contractual right to receive stock in the future was not constructive receipt of the stock and refused to consider the contracts themselves as constituting taxable income, since they were not what taxpayers had bargained for but were merely evidence of taxpayers' right to the stock for which they had bargained. Accordingly, taxpayers'

^{8/} John K. Northrop and Inez H. Nothrop, parties in that case, appealed with respect to the valuation issue as decided by the Tax Court. The appeal was ultimately settled. (See 49-2 U.S.T.C., par. 9406.) The issue of valuation is not involved in this case.

suggestion (Br. 9, 10) of analogizing the instant contract to an option to purchase stock which was specifically bargained for by a taxpayer is unjustified. Moreover, contrary to taxpayers' assertion (Br. 8), the mere labeling of the stock to be received as promotional shares does not distinguish the Cohu decision from the instant case. As in Cohu, in the instant case taxpayers were receiving stock in consideration for their services as promoters of the Corporation as well as for other services.

In Hall v. Commissioner, 15 T.C. 195 (1950), affirmed per curiam, 194 F. 2d 538 (1952), this Court accepted the position adopted by the Commissioner in the instant case. The taxpayer there contended that he became the owner of 50 shares of stock in 1942 when he signed a contract entitling him to the shares. However, this Court agreed with the Tax Court's decision that the shares did not constitute taxable income until 1943 and 1944, at which times the taxpayer acquired the unfettered right of sale, which is one of the most important attributes of ownership. Similarly, taxpayers in the instant case did not acquire the unfettered right of sale until 1960 when the Foundation was able to deliver the stock to them.

Taxpayers cite (Br. 8) Robbins v. Pacific Eastern Corp., 65 P. 2d 42 (Calif. S. Ct. 1937), as authority for the proposition that in certain circumstances the State of California does not

require the physical delivery of a certificate to pass title to stock. See also California cases cited by taxpayers. (Br. 9.) However, this does not aid taxpayers in meeting their burden of proving that title or any other interest in the stock was passed to taxpayers in 1959. As previously noted, the instrument signed by taxpayers in 1959 evidenced their mere expectation of receiving the stock.^{9/}

Accordingly, we submit that taxpayers received the stock in 1960 and that the stock is includible in their income in that year at its fair market value.^{10/}

^{9/} We further submit that Estate of Hobson v. Commissioner, 17 T.C. 854 (1951), is not authority for taxpayers' assertion (Br. 8) that any dividends which would have been declared in 1959 would have been held for the credit of taxpayers. Such an assertion is without any foundation in the record.

^{10/} The fair market value of the 5,291 shares received both by Daniel and by William and the 5,290 shares received by Alfred for his own retention was \$8 per share as stipulated by the parties. (I-R. 85, 102.) Taxpayers are also taxable in 1960 for the additional 5,290 shares which were received by them in 1960 but which were immediately transferred to Malin for \$1 per share. However, the value attributed to the latter shares is limited to \$1 because of taxpayers' obligation to sell to Malin at \$1. Thus, contrary to taxpayers' claim (Br. 10, 11), the Tax Court did not permit taxpayers to be subject to tax in 1959 upon the shares transferred to Malin. Rather, taxpayers were taxable upon all the shares in 1960, but the fair market value of the shares which they were obligated to transfer to Malin for \$1 was established at that price rather than the fair market value of \$8.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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JUNE, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: This _____ day of _____, 1968.

Attorney.

No. 22,444

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SEP 11 1968

DANIEL H. DEUTSCH and EVELYN M. DEUTSCH, Husband and Wife, ALFRED DEUTSCH and BERNICE DEUTSCH, WILLIAM DRELL and ETHEL DRELL,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decisions of the
Tax Court of the United States.

REPLY BRIEF FOR THE PETITIONERS.

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FILED

SEP 9 1968

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TOPICAL INDEX

| | Page |
|--|------|
| Summary of Argument | 1 |
| Argument | 3 |
| <p>The Tax Court Correctly Held That the Contractual Relationship Established Between the Petitioners and Malin Was Valid and Then the Tax Court Failed to Recognize That the Same Contractual Relationship Existed Between the Foundation and the Petitioners. In Effect if Constructive Receipt Was Not Effected in 1959 at Least the Contractual Cost of the Stock to Establish the Base for Capital Gain Was Established in 1959 and Delivery Over of the Stock in 1960 Was to Be Taken Into Taxation by the Petitioners at the Cost Established in 1959</p> | |
| | 3 |

TABLE OF AUTHORITIES CITED

Cases

| | |
|---|---|
| Cohu v. Commissioner, 8 T.C. 796 | 1 |
| Hall v. Commissioner, 15 T.C. 195 | 1 |
| Hobson, Estate of v. Commissioner, 17 T.C. 854 .. | 2 |
| Lehman v. Commissioner, 17 T.C. 652 | 2 |

No. 22,444
IN THE
United States Court of Appeals
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DANIEL H. DEUTSCH and EVELYN M. DEUTSCH, Hus-
band and Wife, ALFRED DEUTSCH and BERNICE
DEUTSCH, WILLIAM DRELL and ETHEL DRELL,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of the Decisions of the
Tax Court of the United States.

REPLY BRIEF FOR THE PETITIONERS.

SUMMARY OF ARGUMENT.

The respondent in referring to *Cohu v. Commissioner* in their brief have failed to recognize that Cohu had no interest and had paid no value for the stock. Said stock was promotional stock and had no par value and the par value at the time the release of said stock would have been the controlling fair market value to be determined as the basis for capital gains.

The respondent further erred in referring to *Fred C. Hall v. Commissioner*, 15 T.C. 195 (1950) in that

Hall had merely a right to the stock if he performed the conditions precedent of actually rendering services. Said services had to be rendered prior to delivery of the stock so it was merely a bonus, or petitioner had a right to earn the stock, but services were a prerequisite to his actually having earned the right to title of said stock. This has no application of the present matter.

In the case of the *Estate of Arthur L. Hobson v. Commissioner*, 17 T.C. 854 (1951) the Court recognized the equitable ownership of Langdon and although Hobson held the legal title they did recognize the fact that the stock ownership did belong to Langdon and Langdon was charged with the dividends.

There is a case specifically on point which is the case of *Robert Lehman v. Commissioner*, 17 T.C. 652. In this case Robert Lehman had purchased the stock for \$17,000.00, but it was subject to being delivered after certain restrictions were removed. Said restrictions were removed on the last day of 1943. The stock was sold for approximately sixty odd thousand dollars in March of 1944. The Commissioner attempted to get the evaluation as of January 1944 which would be a greater fair market value than it was at the time of the purchase on the basis that there had been no delivery and had been subject to certain restrictions and therefore denied the base of \$17,000.00. The Court properly held that Lehman had established the contractual price at \$17,000.00 had used that as a base for reporting capital gains and that said reporting was proper.

ARGUMENT.

In reply to the argument of the respondent the Tax Court erred in that it recognized the fact that the petitioners had made an agreement with Malin to sell him the stock at their cost of \$1.00 per share if and when the stock was delivered to them. Malin recognized this by purchasing said stock when it was made available to them in 1960. However, the Court failed to take into consideration the fact that the Foundation had a contract with the petitioners to furnish the stock at \$1.00 per share. They had cancelled out in effect by this agreement the indebtedness due to the petitioners by the Foundation for services rendered prior to the agreement. Therefore, it is inconceivable how you can recognize a contractual agreement to purchase a stock at \$1.00 per share by the petitioners and their agreement to sell to Malin at \$1.00 per share and divide said contract.

In the respondent's very brief on page 11 of said brief, they show the Foundation trustees who were not under the control of petitioners had resolved on March 24, 1960 that the officers be instructed to confer with counsel with the view towards implementing as expeditiously as possible the memo of agreement, dated January 3, 1959. This was complete recognition of the contractual liability and the performance of said liability.

The Commissioner has raised much issue as to constructive receipts. The taxpayers should probably have properly reported the income in 1959, but were under the impression that they could not report it until such time as they had received it. Although they did establish the purchase price at \$1.00 per share. When the stock

was received in 1960 they properly took it into their income as \$1.00 per share and when sold in 1961, they properly reported the difference as capital gain. The portion allotted to Malin was sold to him at \$1.00 per share. The fact that there was a condition subsequent that in the event the corporation was unable after a five year period to release the stock and tender them the stock, that then they would have the possibility of reverting to a claim for salaries against the Foundation, does not constitute any receipt in the future of said stock. The conditions of restriction were known to both the Foundation and the petitioners at the time of the purchase and the agreement was that they would wait for actual delivery of the stock. This they did and when they received it they brought it into their income at the agreed on purchase price.

The petitioners therefore request this Honorable Court to recognize the fact that they had a contract as of January 3, 1959 with the Foundation in that they agreed to participate with Malin in part of that contract. If the Court would recognize the contract of Malin, they must necessarily recognize the contract to the petitioners from the Foundation. No respectful race track would allow a thoroughbred on the track that was three-quarters horse and one-quarter mule, nor can a contract be recognized for twenty-five percent and denied for seventy-five percent, when the same factual situation covers both sides or all aspects of said contract.

DERMOT R. LONG,

Attorney for Petitioners.

N O. 2 2 4 4 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIGUEL ANGULO SALAZAR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

RECEIVED

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TOPICAL INDEX

| | <u>Page</u> |
|--|-------------|
| Table of Authorities. | ii |
| I STATEMENT OF JURISDICTION. | 1 |
| II STATUTE INVOLVED. | 2 |
| III QUESTION PRESENTED. | 3 |
| IV STATEMENT OF FACTS. | 3 |
| V ARGUMENT. | 6 |
| THE TESTIMONY BY CHRIS SAIZ THAT A CO-CONSPIRATOR SAID HIS SOURCE WAS INSIDE WAS ADMISSIBLE. | 6 |
| CONCLUSION. | 9 |

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page</u> |
|---|-------------|
| Fuentes v. United States, 233 F. 2d 537 (9th Cir. 1960) | 7 |
| Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229 (1917) | 7 |
| <u>Statutes</u> | |
| Title 18 United States Code, §3231 | 2 |
| Title 21 United States Code, §174 | 1-2 |
| Title 28 United States Code, §1291 | 2 |
| Title 28 United States Code, §1294 | 2 |

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIGUEL ANGULO SALAZAR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

On April 19, 1967, the defendant was indicted in one count of an eight count indictment by the Federal Grand Jury for the Central District of California for the concealment and transportation of over one kilogram of heroin in violation of Title 21, United States Code, Section 174 [C. T. 2]. ^{1/} Following a severance from his co-defendant and a trial by jury before the Honorable William P. Gray, United States District Judge, from May 31, 1967,

^{1/} "C. T. " refers to the Clerk's Transcript.

through June 2, 1967, appellant was found guilty.

Defendant was convicted and sentenced on June 27, 1967, to the custody of the Attorney General for seven years [C. T. 75].

Salazar filed, on June 6, 1967, a timely Notice of Appeal [C. T. 77].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 174.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States, . . . contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported, or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000."

*

*

*

"Whenever on trial for a violation of this section the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

QUESTION PRESENTED

Whether the testimony of Chris Saiz to the effect that Alfred Sesma identified his "source" as being in the house was admissible.

IV

STATEMENT OF FACTS

On April 3, 1967, Chris Saiz, an agent of the Federal Bureau of Narcotics, met with Alfred Sesma, the co-indictee of Angulo-Salazar, in the vicinity of Sesma's residence [R. T. 111-112]. ^{2/} Sesma asked Saiz why he hadn't made any recent purchases of heroin from him and Saiz said because the heroin was of poor quality and he [Saiz] didn't want to make any more small purchases [R. T. 112]. When Sesma asked Saiz how much heroin

^{2/} "R. T." refers to the Reporter's Transcript.

he wanted, Saiz responded by saying at least 35 ounces [R. T. 114]. When Saiz assured Sesma that he was serious, Sesma said he would call his source of heroin in Culiacan, Mexico [R. T. 114]. Sesma said he had to see the money before the call was placed and Saiz showed him a roll of \$2,700 [R. T. 114-15]. Sesma then said he would call his source of supply [R. T. 115]. After leaving Saiz's presence for about a half-hour, Sesma returned, said he had called his source in Mexico, but said he was not certain the heroin could be delivered on the sixth as Saiz wanted [R. T. 115].

Sesma then told Saiz to return on April the fifth with \$3,500 because the heroin would be \$100 per ounce [R. T. 115].

On April 5, 1967, Saiz met with Sesma [R. T. 116]. Sesma said he had received a call from his source in Mexico and delivery on the sixth could not be made [R. T. 116-117]. When Saiz demanded delivery on the sixth Sesma left and made a phone call [R. T. 117]. Sesma returned from the phone call and said he would definitely have the heroin on April 7 [R. T. 117]. At that time Sesma offered Saiz 8 or 10 ounces to tide him over [R. T. 118]. An appointment was then made to meet on April 7 [R. T. 119]. Sesma told Saiz to be at his [Sesma's] house at approximately 6:00 P. M. [R. T. 119].

On April 7, 1967, Saiz went to Sesma's residence and Sesma came out of the house [R. T. 121]. When Saiz asked Sesma if the heroin was available, Sesma said it was "but that he and his source of supply were in the process of packaging the heroin" [R. T. 121-122]. Sesma said his source of supply was inside

Sesma's house [R. T. 122]. Sesma then showed Saiz some heroin and said it was a sample of that which his source had just brought from Mexico [R. T. 122]. Then Sesma said " . . . he did not want me to talk to his source of supply at that time" and to wait in the area -- not to leave [R. T. 123]. Sesma told Saiz to wait in the street near the house so Sesma could see him at all times until the heroin was packaged [R. T. 123]. After some time Saiz knocked at the door and said he was tired of waiting [R. T. 123]. Sesma said it would be just a few minutes and invited Saiz into the house [R. T. 123]. As Saiz entered he saw the defendant Salazar standing near the dining room table with a pot [Ex. 1-E] containing heroin in front of him [R. T. 123-124]. Salazar was holding a flour sifter [Ex. 4] above the pot [R. T. 124-125], and was sifting heroin [R. T. 125]. Saiz was introduced to Salazar as "the man that was buying the heroin" [R. T. 125-126]. After Saiz sat down he complained that the past heroin had been of poor quality [R. T. 136]. Salazar said that "this heroin was of good quality" a number of times [R. T. 137]. Salazar said it was better than the heroin Saiz had received before [R. T. 137]. Salazar said that if Saiz were to have future transactions of the instant size that he could provide Sesma with the heroin [R. T. 137]. Salazar asked for a number of day's notice "because it was a long ways to travel to Culiacan" [R. T. 137]. Salazar asked Saiz to verify his reliability in providing narcotics with Sesma [R. T. 137]. Salazar said he had brought in heroin in the past and it was not difficult inasmuch as the people at the border were "rather stupid" [R. T. 138].

Sesma and Salazar asked Saiz to help them in the packaging and he did [R. T. 138].

After the arrest the heroin was seized and eventually admitted as Exhibit 1-B [R. T. 141, 146].

Following the arrest of Salazar, he admitted that he obtained the heroin from the people who made it in the Culiacan area [R. T. 194].

On direct examination the defendant testified that "the individual" gave him the package "to bring it over here" [R. T. 219]. A man promised him \$150 to take the little package "to the other side" [R. T. 220]. The package was received in Mexico [R. T. 222], and "Pinto" said to take it to Sesma [R. T. 223]. Salazar testified, he didn't "know for a fact" it was heroin [R. T. 228].

V

ARGUMENT

THE TESTIMONY BY CHRIS SAIZ THAT A
CO-CONSPIRATOR SAID HIS SOURCE WAS
INSIDE WAS ADMISSIBLE.

"In order that the declaration and conduct
of third parties may be admissible in such a case
it is necessary to show by independent evidence
that there was a combination between them. . . ."

Hitchman Coal & Coke Co. v. Mitchell,

245 U.S. 229, 249 (1917), quoted in

Fuentes v. United States, 233 F.2d 537

(9th Cir. 1960).

Appellant's only specification of error is that the relation by Chris Saiz of some statements of Alfred Sesma were merely narrative, and not in furtherance of the common scheme or conspiracy.

As the statement of facts, supra, shows, Saiz had been negotiating with Sesma for the purchase of 35 ounces of heroin. Saiz wanted the heroin on April 6, 1967, whereas Sesma said it could only be delivered on the seventh. When the two met on the seventh Sesma said it was there but a delay was necessary because the heroin was being packaged and Saiz would have to wait outside Sesma's house. In explanation of the delay and to assure Saiz that the evening would not be a waste of Saiz' time, Sesma made the following statements, whose admission are assigned as error: (1) "he (Sesma) and his source of supply were in the process of packaging the heroin [R. T. 122, lines 1-2; (2) " . . . his source of supply was presently inside of his residence, inside of the Sesma residence at 4228 Lindsey, and that he was packaging or preparing the heroin [R. T. 122, lines 5-7]; (3) "He told me that this was some of the heroin that his connection, his source of supply, had brought up from Mexico, and that this was some of the heroin that he was going to sell me" [R. T. 122, lines 12-15]; and (4) "He told me that he did not want me to talk to his source of

supply at that time, at that particular instance [sic], and he asked me to wait in the area until the heroin was packaged, and that he would call me" [R. T. 123, lines 1-4].

Without quarrelling with appellant's legal position, it is submitted that each statement narrated by Saiz, was made in furtherance of the conspiracy between Sesma and Salazar.

It is noted that no objection was made by the defendant at the trial that said statements were merely narrative as urged here. In the trial court, Salazar merely objected to entire lines of testimony on the ground that they constituted hearsay. Here, appellant readily acknowledges that a co-conspirator "cannot object to the declaration of a co-conspirator made to further the objects of the conspiracy . . ." [Op. Br., p. 8].

Appellant urges that the admission of the above testimony was prejudicial because Saiz did not identify Salazar as the source by admissible evidence [Op. Br., p. 12]. The Court's attention is directed to pages 136 to 138 of the Reporter's Transcript wherein Saiz related that Salazar, during the packaging phase of the operation, related that he had brought in heroin to Sesma before, this was good quality heroin, and he brought it in from Mexico himself. Aside from the above testimony Salazar admitted, after his arrest, that he brought in the heroin from Culiacan.

Appellant's argument that the cited testimony was merely narrative is wrong. The statements were made by Sesma in furtherance of an object of the conspiracy -- the delivery itself.



CONCLUSION

For the above stated reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Appellant

v.

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Appellee

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BRIEF FOR THE APPELLEE

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INDEX

| | Page |
|--------------------------|------|
| Opinion below----- | 1 |
| Jurisdiction----- | 1 |
| Question presented----- | 3 |
| Statute involved----- | 3 |
| Statement----- | 4 |
| Summary of argument----- | 6 |
| Argument: | |

The referee and District Court correctly held that the supplement to the proof of claim filed by the United States on December 22, 1966, was a proper amendment of a timely claim and, therefore, was not barred by Section 57n of the Bankruptcy Act----- 8

A. Introduction----- 8

B. The Government's amended proof of claim was timely filed in accordance with Menick v. Hoffman----- 9

C. The provisions for filing refund claims under the Internal Revenue Code of 1954 are inapplicable to proofs of claim filed under the Bankruptcy Act----- 15

D. The equities support the Government's right to amend its proof of claim- 20

Conclusion----- 24

CITATIONS

Cases:

| | |
|--|-------|
| <u>Bank of Marin v. England</u> , 385 U.S. 99----- | 24 |
| <u>Coleman v. Alcock</u> , 272 F. 2d 618----- | 21 |
| <u>Ebeling, In re</u> , 123 F. 2d 520----- | 11 |
| <u>Foman v. Davis</u> , 371 U.S. 178----- | 18 |
| <u>Glazer, Lewis J., Inc., In re</u> , 95 F. Supp. 472----- | 14,15 |



Cases (continued):

| | |
|---|-------------------|
| <u>Harmack Produce Co., In re</u> , 44 F. Supp. 1----- | 14 |
| <u>Menick v. Hoffman</u> , 205 F. 2d 365----- | 6,7,9,10,11,12,14 |
| <u>Parchem, In re</u> , 166 F. Supp. 724----- | 11 |
| <u>Pepper v. Litton</u> , 308 U.S. 295----- | 24 |
| <u>Wheeling Valley Coal Corp. v. Mead</u> , 171 F. 2d 916----- | 14 |

Statutes:

Bankruptcy Act, c. 541, 30 Stat. 544:

| | |
|---|-------------------|
| Sec. 17 (11 U.S.C. 1952 ed., Sec. 35)----- | 10 |
| Sec. 18 (11 U.S.C. 1964 ed., Sec. 41)----- | 18 |
| Sec. 22 (11 U.S.C. 1964 ed., Sec. 45)----- | 2 |
| Sec. 25 (11 U.S.C. 1964 ed., Sec. 48)----- | 2 |
| Sec. 57 (11 U.S.C. 1964 ed., Sec. 93)----- | 2,3,6,7,8,9,19,20 |
| Sec. 70 (11 U.S.C. 1964 ed., Sec. 110)----- | 21 |

Internal Revenue Code of 1954:

| | |
|---|----|
| Sec. 61 (26 U.S.C. 1964 ed., Sec. 61)----- | 13 |
| Sec. 6402 (26 U.S.C. 1964 ed., Sec. 6402)---- | 15 |
| Sec. 6511 (26 U.S.C. 1964 ed., Sec. 6511)---- | 16 |
| Sec. 7422 (26 U.S.C. 1964 ed., Sec. 7422)---- | 15 |

Miscellaneous:

2 Barron and Holtzoff, Federal Practice and
Procedure (Rules ed.):

| | |
|---------------|----|
| Sec. 442----- | 18 |
| Sec. 445----- | 18 |
| Sec. 447----- | 18 |
| Sec. 448----- | 18 |

3 Collier on Bankruptcy (14th ed., 1967),

| | |
|-----------------------------------|-------|
| Sec. 57.11, pp. 179, 182-200----- | 11,19 |
|-----------------------------------|-------|

3 Moore's Federal Practice (2d ed.):

| | |
|-----------------|----|
| Sec. 15.02----- | 18 |
| Sec. 15.08----- | 18 |

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,447

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WM. H. MECOM and ZETTYE M. MECOM,

Appellant

v.

UNITED STATES OF AMERICA, INTERNAL
REVENUE SERVICE,

Appellee

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

OPINION BELOW

The District Court wrote no opinion. Its order affirming
the order of referee (I-R. 81-82) is not officially reported.

JURISDICTION

This is an appeal by the trustee in bankruptcy from
an order of the District Court overruling the trustee's objections
to amended claims for income taxes filed by the District Director.
William Howard Mecom and his wife filed voluntary petitions in

bankruptcy on September 10, 1964. (I-R. 2-28.) Pursuant to Section 22 of the Bankruptcy Act, as amended, the proceeding was referred to a referee in bankruptcy. (I-R. 2.) The first meeting of creditors was held on October 12, 1964. (I-R. 29.)

Within the six months' period for filing proofs of claim set forth in Section 57n of the Bankruptcy Act, as amended, the Internal Revenue Service filed, on April 12, 1965, a proof of claim for taxes in the amount of \$6,838.41 (I-R. 56); it filed an amended proof of claim on January 24, 1966, in the amount of \$6,292.82 (I-R. 57), and a supplemental proof of claim on December 22, 1966, for \$46,578 (I-R. 58). On March 9, 1967, it filed a proof of claim amending and consolidating its prior proofs of claim in the amount of \$53,362.39. (I-R. 62.)

On January 17, 1967, the trustee in bankruptcy filed an objection to the Service's proof of claim dated December 22, 1966. (I-R. 61.) The referee overruled the trustee's objections. (I-R. 70.) Within the period allowed by Section 39c of the Bankruptcy Act, as amended, the trustee filed a timely petition for review on July 27, 1967. (I-R. 72-73.) Pursuant to jurisdiction conferred upon it by 28 U.S.C., Section 1334, and Section 23 of the Bankruptcy Act, as amended, the District Court on September 27, 1967, entered an order affirming the order of the referee. (I-R. 81-82.) Within the time permitted by Section 25 of the Bankruptcy Act, as amended, the trustee filed a notice of appeal on October 24, 1967. (I-R. 83-84.)

Jurisdiction is conferred upon this Court by 28 U.S.C., Section 1291, and Section 24 of the Bankruptcy Act, as amended.

QUESTION PRESENTED

Whether under Section 57n of the Bankruptcy Act, as amended, proof of claim for taxes filed by the Internal Revenue Service on December 22, 1966, is a proper amendment to its original claim, which was timely filed or a new and separate claim which was untimely filed.

STATUTE INVOLVED

Bankruptcy Act, c. 541, 30 Stat. 544:

Sec. 57. Proof and Allowance of Claims--[as amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840].

a [as amended by Sec. 1, Act of June 12, 1960, P.L. 86-519, 74 Stat. 217]. A proof of claim shall consist of a statement, in writing and signed by a creditor, setting forth the claim; the consideration therefor; whether any and, if so, what securities are held therefor; and whether any and, if so, what payments have been made thereon; and that the claim is justly owing from the bankrupt to the creditor. A proof of claim filed in accordance with the requirements of the Bankruptcy Act, the General Orders of the Supreme Court, and the official forms, even though not verified under oath, shall constitute prima facie evidence of the validity and amount of the claim.

* * * * *

n [as amended by Sec. 14(b), Act of July 7, 1952, c. 579, 66 Stat. 420]. Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any State or any subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: Provided, however, That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or any subdivision thereof: Provided further, That the right of infants and insane persons

without guardians, without notice of the bankruptcy proceedings, may continue six months longer: And provided further, That a claim arising in favor of a person by reason of the recovery by the trustee from such person of money or property, or the avoidance by the trustee of a lien held by such person, may be filed within thirty days from the date of such recovery or avoidance, but if the recovery is by way of a proceeding in which a final judgment has been entered against such person, the claim shall not be allowed if the money is not paid or the property is not delivered to the trustee within thirty days from the date of the rendering of such final judgment, or within such further time as the court may allow. When in any case all claims which have been duly allowed have been paid in full, claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as the court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case.

(11 U.S.C. 1964 ed., Sec. 93.)

STATEMENT

The relevant facts, some of which were found by the referee (I-R. 63-67), may be summarized as follows:

The bankrupts, William Howard Mecom and his wife filed voluntary petitions in bankruptcy on September 10, 1964. The first meeting of creditors was held on October 12, 1964. The Internal Revenue Service filed a proof of claim on April 12, 1965, for \$6,838.41 of taxes owed by the bankrupts. These taxes consisted of \$360 of excise taxes for the fiscal year ended June 30, 1965, which had been assessed prior to bankruptcy, a \$36.14 balance of income taxes for 1960, and income taxes for 1961 and 1962. (I-R. 2-28, 29, 56, 65.)

In the meantime, and shortly after the first meeting of creditors, the trustee in bankruptcy filed a petition against H & M Distributing Company, Inc., and H & M Freight Company, a fictitious name under which the corporation did business, in which the trustee claimed that H & M Distributing Company was the alter ego of the bankrupt. The referee found that H & M was the alter ego of the bankrupt and ordered the corporation's assets turned over to the trustee to be administered as part of the bankruptcy estate. (I-R. 31-55, 66.)

The Internal Revenue Service filed an amendment to its proof of claim on January 24, 1966. This amendment credited certain payments and other amounts, leaving a net balance owing of \$6,292.82, comprised of income taxes for 1961 and 1962. (I-R. 57, 66.) The Service filed a supplemental proof of claim on December 22, 1966, in the amount of \$46,578 for 1963 and 1964 income taxes. This claim was based primarily on the alter ego judgment and recovery by the trustee. The trustee did not have actual notice of the claim for 1963 and 1964 taxes until it was filed by the Service. (I-R. 58, 66-67.) Thereafter, the Service on March 9, 1967, filed a claim which consolidated its prior claims and also added an administrative expense claim for excise taxes.^{1/} (I-R. 62, 67.)

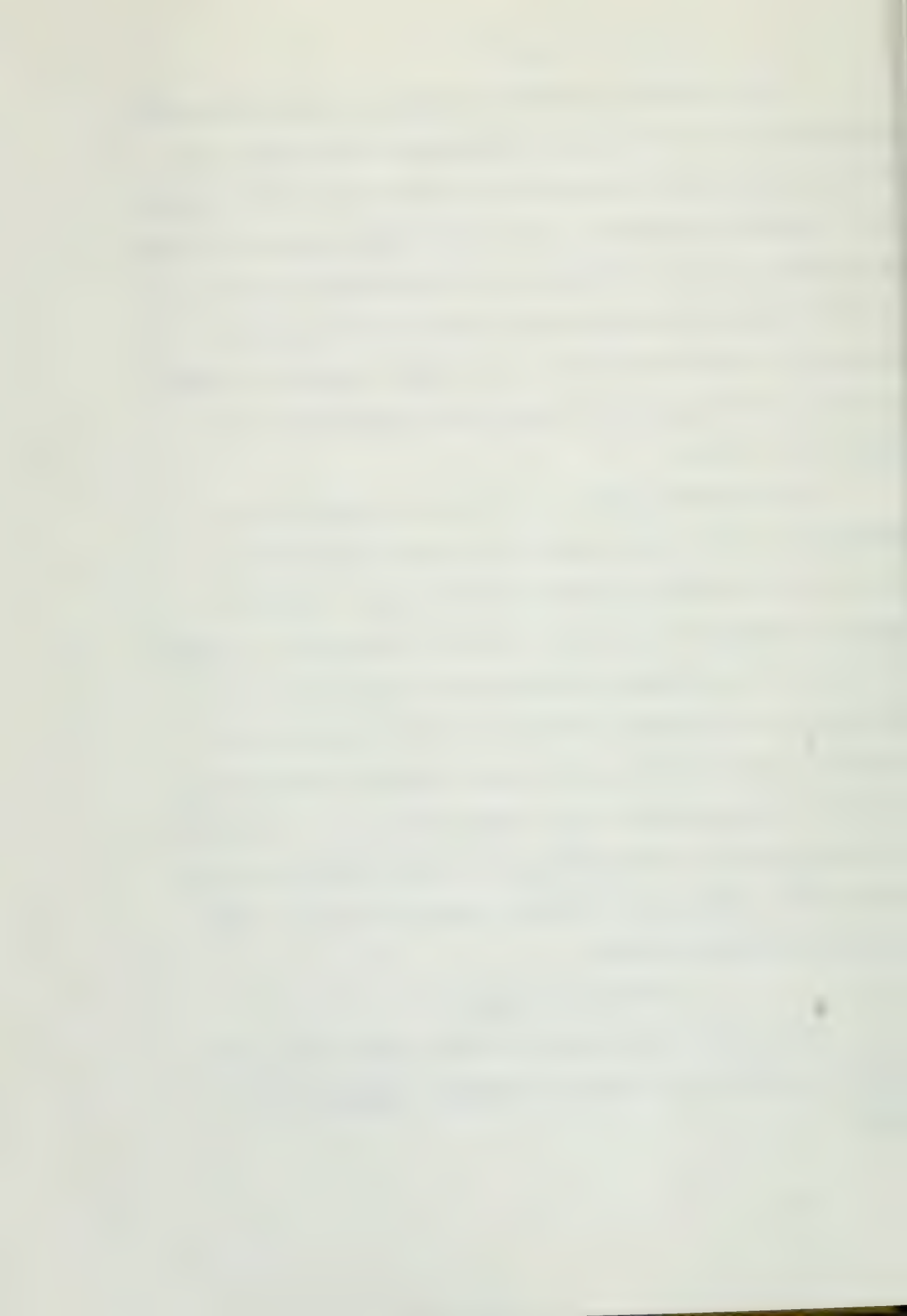
^{1/} There is no issue in the present case concerning the claimed administrative expense taxes. (II-R. 16-19.)

In the meantime, several days before the Service filed its supplemental claim, the trustee on December 19, 1966, filed his first report and account and petition to pay administration expenses and a dividend to creditors. The referee filed on December 23, 1966, his findings of fact, conclusions of law, and order confirming the trustee's report and authorizing him to pay certain costs and expenses of administration and, to the extent possible, a dividend on filed and allowed priority claims and on general unsecured claims. (I-R. 59-60.)

The trustee objected to the Service's amended claim of December 22, 1966, on the ground that it was not timely filed. (I-R. 61.) The referee, relying upon this Court's decision in Menick v. Hoffman, 205 F. 2d 365, overruled the trustee's objection and held that the amendment was proper under Section 57n of the Bankruptcy Act, as amended, because the taxes included in the amended claim had the same generic origin and their recovery was based upon the same ground as the original claim. (I-R. 67-68, 75.) Upon a petition for review filed by the trustee (I-R. 72-73), the District Court affirmed the referee's order (I-R. 81-82). This appeal followed. (I-R. 83-84.)

SUMMARY OF ARGUMENT

This case is indistinguishable from, and is fully controlled by, this Court's decision in Menick v. Hoffman, 205 F. 2d 365.



Menick v. Hoffman holds that an amended additional claim of the United States for taxes owed by the bankrupt filed after the six-month period allowed by Section 57n of the Bankruptcy Act, as amended, is not a new claim but constitutes a proper amendment of a prior claim which had been timely filed. This decision is fully in accord with decisions holding that Section 57n does not prevent the filing of amendments to proofs of claims after expiration of the six-month period and which liberally allow amendments which are germane to the original claim and do not establish an entirely new and different claim.

Whatever factual differences may exist between the present case and Menick v. Hoffman, none calls for a different result here. In both cases the amended proofs of claim included income taxes for different years than those included in the claims which were timely filed. In each case the taxes claimed by the Government in an amended proof of claim were of the same generic origin and did no more than bring forward and make effective a federal tax indebtedness of the bankrupt which previously had been asserted in the original claim.

There is no warrant for comparing the extent to which a claimant may amend a proof of claim under Section 57n with the extent to which different kinds of claims may be amended under other statutes. Those other statutes serve very different purposes than the Bankruptcy Act, and it is the policies of the latter which must determine the scope of Section 57.

Alternatively, the bankruptcy court has jurisdiction under its equity powers to admit the Government's amended proof of claim to prevent an injustice.

ARGUMENT

THE REFEREE AND DISTRICT COURT CORRECTLY HELD THAT THE SUPPLEMENT TO THE PROOF OF CLAIM FILED BY THE UNITED STATES ON DECEMBER 22, 1966, WAS A PROPER AMENDMENT OF A TIMELY CLAIM AND, THEREFORE, WAS NOT BARRED BY SECTION 57n OF THE BANKRUPTCY ACT

A. Introduction

Section 57a of the Bankruptcy Act, as amended, supra, provides for the filing of a proof of claim, i.e., a statement by a creditor of the bankrupt, and Section 57n, supra, requires that such a proof of claim be filed within six months after the first date set for the first meeting of creditors, except that the United States or a state may obtain a reasonable extension of time for filing. The undisputed facts of the present case are that the United States filed an admittedly timely proof of claim for income taxes owed by the bankrupt for the years 1961 and 1962, and that after expiration of the six-month period it filed what it denominated a "Supplemental Proof of Claim" for income taxes owed by the bankrupt for the years 1963 and 1964.

The United States is not contending that it offered its amendment for the limited purpose of remedying an error or a defect in form in its initial proof of claim. Likewise, the United States

is not alleging that it requested or received permission from the referee to file its amendment, or that it is not subject to the requirements of Section 57n for filing a timely proof of claim. Instead, the first issue in this case is whether the amendment presented an entirely new and different claim which was untimely filed under Section 57n, as the trustee contends, or whether the claim set forth in the amendment was of the same generic origin as its original claim, and therefore was properly filed under Section 57, as the United States contends and the referee and District Court held. The second issue is whether the bankruptcy court has jurisdiction under the equity powers to admit the Government's amended proof of claim.

B. The Government's amended proof of claim
was timely filed in accordance with
Menick v. Hoffman

In Menick v. Hoffman, 205 F. 2d 365 (C.A. 9th), the first meeting of creditors was held on May 22, 1950, and the Government filed a proof of claim on November 21, 1950, one day prior to the expiration of the six-month filing period. This proof of claim was for F.I.C.A. taxes and income withholding taxes of the bankrupt's employees for the first quarter of 1950. On May 23, 1951, six months and one day after the running of the time for filing claims, the Government filed what it called an amended additional claim for income taxes owed by the bankrupt and his wife for the years 1944, 1945, and 1946. The trustee objected to the amended claim on the

ground that it was an entirely new and different claim. The referee sustained his objection, but the District Court reversed, and this Court affirmed the District Court's order as follows (p. 368):

Not only does the caption or description of the questioned claim connote that it is a supplemental entity, the instrument being designated "Amended additional claim of United States for taxes," but the text of each of the two verified statements of indebtedness expressly shows a conjoint and correlative nature of the debt to be internal revenue taxes due to the United States. In the incipient tax claim signed and sworn to by the Collector of Internal Revenue on November 17, 1950, it is stated, "(2) that the nature of said debt is internal revenue taxes due pursuant to law as follows:" Then follows an item of "withholding" taxes, and in the questioned claim an identical expression of the nature of the debt is stated which is also followed by itemization of income taxes.

Thus the questioned claim in suit contains only a statement of additional items amplifying a species of tax relationship and obligation that was asserted in the original claim and that continued to exist between the bankrupt and the sovereign taxing authority relative to internal revenue taxes. Cf. United States v. Roth, 2 Cir., 164 F. 2d 575; Continental Motors Corporation v. Morris, 10 Cir., 169 F. 2d 315; Industrial Commissioner of New York v. Schneider, 2 Cir., 162 F. 2d 847.

^{2/} The Government did not participate in the proceedings in the District Court or on appeal. At the time Menick was decided Section 17 of the Bankruptcy Act, as amended (11 U.S.C. 1952 ed., Sec. 35), did not discharge any federal taxes from bankruptcy. Thus it would appear that the Government could have collected the taxes included in its amended proof of claim from the discharged bankrupt out of his after-acquired assets.

The duly filed initial claim of November 21, 1950, was for unpaid income taxes although the instrument itemizes the nature of the tax due as a "withholding" tax. But withholding taxes are income taxes which the employer must deduct from the wages of employees and for the payment of which tax the employer is liable to the Government. Both are demands of the same generic origin. And in such a situation the questioned claim filed with the referee May 23, 1951, does no more than bring forward and make effective a federal tax indebtedness of the bankrupt to the United States which was asserted in the initial claim. There is no change in the basic ground for recovery that is set out in the earlier claim on file with the referee.

The omnibus attributes of the initial claim of the United States for taxes warrants the conclusion that the questioned instrument filed with the referee May 23, 1951, is not an entirely new, different, separate and distinct claim of the United States, the filing or consideration of which is interdicted or barred by Section 57 sub. n, of the Bankruptcy Act.

This Court's decision in Menick is fully in accord with the long-standing practice of liberally allowing amendments to proofs of claim. Thus, if the original proof of claim is timely filed, the only limitation relevant here is that the amendment does not introduce a distinctly new and different claim but bears some relation to the original claim. See In re Ebeling, 123 F. 2d 520, 521 (C.A. 7th); In re Parchem, 166 F. Supp. 724, 730 (Minn.). See also, 3 Collier on Bankruptcy (14th ed., 1967), Sec. 57.11, pp. 179, 182-200. In Menick, as we have shown, supra, this Court

held that the Government's amended claim was related to its original one because of the omnibus attributes of the Government claim for taxes, and there was no change in the basic ground for recovery.

There is no merit to the trustee's contention (Br. 6-10, 20-27), that the facts of the present case distinguish it from Menick. If anything, the Government's position is stronger here. For example, in Menick the original claim was for F.I.C.A. taxes and income withholding taxes for 1949 and 1950, and the amended claim was for income taxes owed by the bankrupt and his wife for earlier years, 1944, 1945 and 1946, whereas, in the present case, the initial claim was for income taxes for 1961 and 1962, and the amendment covered income taxes for 1963 and 1964.

The trustee errs in contending (Br. 25) that the Government's claim for 1963 and 1964 income taxes is entirely new because they had different assessment or reference numbers from the numbers assigned to the taxes claimed for the years 1961 and 1962. Such a contention is completely irrelevant. It overlooks the fact that each kind of tax is assessed separately, and that even the same tax is assessed separately for each separate period. Nevertheless, when the Government files a proof of claim it attempts to include in one claim all taxes, with their separate assessment and reference numbers, which are presently determined to be owing. Likewise, if the Government subsequently determines a deficiency for a particular

tax and for a specific period, the claimed deficiency bears a different assessment or reference number from the initial assessment.

Additionally, there is no basis for the trustee's contention (Br. 8-9, 26-27), that the Government relied upon different theories in its initial and amended claims. The trustee contends that (Br. 8) "The original claims were made on the theory that the bankrupt did not properly prepare his returns for the years 1961 and 1962", whereas (Br. 8-9) "The subject claim adopts an entirely new theory, namely that in view of a court's determination that the corporation was the alter ego of the taxpayer, Internal Revenue Service may disregard the corporate existence and treat all income and expense of the non-bankrupt corporation as the income and expense of the bankrupt individual". Such a contention overlooks Section 61(a) of the Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 61), which imposes an income tax upon all income from whatever source derived (except items specifically excluded by statute), as well as the fact that the ultimate ground relied upon by the Government in its proof of claim is that a bankrupt taxpayer failed to pay tax upon realized income. This is supported by an examination of the form used by the Government to file proofs of claim for internal revenue taxes, Form 2317. (I-R. 56, 57, 58, 62.) This form, which has been universally accepted by bankruptcy courts, sets forth only one ground in support of the Government's claim, that the bankrupt taxpayer is indebted to the United States



for taxes due under the internal revenue laws, and that no part of the claimed amount has been paid. Accordingly, the statement contained in the Government's amended proof of claim, that the bankrupt owed the additional amount claimed for internal revenue taxes, meets the requirement in Menick, that the basic ground be the same, and any reference to underlying legal or factual reasons in support of this ground is superfluous.

The decisions relied upon by the trustee (Br. 7-9) are not on point. For example, in Wheeling Valley Coal Corp. v. Mead, 171 F. 2d 916 (C.A. 4th), the creditor filed its original claim against the receiver for damages caused to the mines by the receiver's operations. Its amended claim was for damages caused by the bankrupt's breach of provisions in the lease requiring the mining of minimum monthly tonnage of coal and the surrender of the property to the lessor with the equipment in place and in a condition capable of producing a specified minimum monthly tonnage. Thus, the creditor's amended claim was directed against a different individual than was its original claim and the substance of its amended claim was radically different from that asserted initially.

In re Lewis J. Glazer, Inc., 95 F. Supp. 472 (Mass.), and In re Harmack Produce Co., 44 F. Supp. 1 (S.D. N.Y.), relied upon by the trustee (Br. 7-9), are also not on point. In these cases the United States and the City of New York, respectively, failed to file any timely proofs of claim. These decisions upheld the trustees'

objections to the untimely filed claims on the ground that there was nothing to which these proofs of claim could relate back and amend. The fact that the bankrupt had included the Government's tax claim in its schedule of debts filed with its petition in bankruptcy was held in Glazer insufficient to constitute the filing of a timely proof of claim by the Government.

C. The provisions for filing refund claims under the Internal Revenue Code of 1954 are inapplicable to proofs of claim filed under the Bankruptcy Act

The trustee relies strongly (Br. 11-20) upon various restrictions in the Internal Revenue Code of 1954 upon the filing by a taxpayer of untimely amendments to a claim for refund and contends that the same strictures should apply to the filing of amendments to a proof of claim in bankruptcy. This contention overlooks the fact that the practice of liberally allowing amendments to a proof of claim must be determined by reference to the history and policies of the Bankruptcy Act and not by provisions in other statutes with different histories and aims.

Section 6402 of the Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 6402) authorizes the Internal Revenue Service to credit or refund any internal revenue tax found to have been overpaid. Section 7422(a) of the 1954 Code (26 U.S.C. 1964 ed., Sec. 7422) provides that the filing of a claim for refund shall be a jurisdictional prerequisite to a suit for recovery of the tax,



and Section 6511 (26 U.S.C. 1964 ed., Sec. 6511) establishes the period of limitation for filing refund claims. Whatever limitations exist under the statute, Treasury Regulations, or otherwise, requiring a claim to set forth in detail each ground upon which it relies or limiting a refund to grounds set forth in claims which were timely filed, these are inapplicable here.

The trustee fails to recognize that refund proceedings under the 1954 Code involve claims brought by a taxpayer against the Government and constitute an exception to the immunity of a sovereign from suit. There is no doubt that a sovereign can impose various jurisdictional and similar requirements as a prerequisite to allowing a court proceeding against it. The filing of a proof of claim in bankruptcy by the Government to collect taxes owed by a bankrupt taxpayer, on the other hand, does not involve any question of sovereign immunity. Instead, this has been the traditional method of satisfying claims of unsecured creditors. Thus, there is no correlation between any limitations upon amending a refund claim filed with the Government and the lack of similar restrictions upon amending a proof of claim in bankruptcy.

There are other differences between a claim for refund filed by a taxpayer under the 1954 Code and a proof of claim for taxes filed by the Government in bankruptcy. Our tax system is largely one of self-assessment by taxpayers of amounts owed by them.

A taxpayer who files a refund for taxes usually possesses the pertinent information, but the converse is not always true. Frequently the Government lacks needed information. If the provisions of the 1954 Code relating to the administrative procedures for handling refunds and requiring their observance before instituting an action in court are to be meaningful, the Government must be supplied with sufficient information to enable it to act intelligently on the refund claim. If this information is not forthcoming, or a taxpayer may amend his claim and immediately thereafter sue for a refund, the Government may be prevented from acting on the claim and may be precipitated into a needless lawsuit.

The situation is very different where the Government files a proof of claim for taxes owed by the bankrupt. Generally the Government obtains needed information from the taxpayer's books and records, which have been taken over and are available to the trustee. There is little likelihood that a trustee will be surprised by the Government's proof of claim or amendment or will be unable to determine whether or not to interpose an objection. This is particularly true in the present case, where the Government's amendment was based upon a judgment requested and obtained by the trustee (I-R. 31-35), and he reasonably should have considered the possible tax consequences of the judgment.^{3/}

^{3/} The decisions relied upon by the trustee (Br. 11-20) apply to amendments to refund claims and, hence, are not on point.



The trustee also mistakenly relies (Br. 15-18) upon a supposed analogy between an amendment to a proof of claim and an amendment to a pleading under Rule 15(a) of the Federal Rules of Civil Procedure. In addition to overlooking the basic differences between the two situations, the trustee errs in contending that Rule 15(a) strictly limits the right of a party to a lawsuit to amend a pleading. Amendments to a pleading have been liberally allowed, provided they do not result in undue prejudice to the adverse party. Subject to this proviso, amendments have been allowed at any stage of the case, and it has been held immaterial whether the amendment changes the cause of action or theory of the case or states a claim arising out of a transaction different from that originally sued upon. See Foman v. Davis, 371 U.S. 178, 182. See also, 2 Barron and Holtzoff, Federal Practice and Procedure (Rules ed.), Secs. 442, 445, 447, and 448; 3 Moore's Federal Practice (2d ed.), Secs. 15.02 and 15.08^{4/}.

^{4/} General Order 37 of the General Orders in Bankruptcy (11 U.S.C., Appendix, 1964 ed.) provides that the Federal Rules of Civil Procedure shall apply to proceedings under the Bankruptcy Act insofar as they are not inconsistent with the Act. Rule 15(a) permits a party to amend his pleading once as a matter of course at any time before a response has been served and thereafter upon leave of court. Although this provision is more relevant to the filing of pleadings under Section 18 of the Bankruptcy Act, as amended (11 U.S.C. 1964 ed., Sec. 41), Collier has also

[Continued]

The trustee also contends (Br. 18-20) that if a proof of claim is filed pursuant to Section 57, and is not objected to by the trustee, the claim is allowed. He then contends, by analogy to tax refund decisions, that once a claim has been allowed and the time for filing another claim has expired, the original claim may not be amended. Previously, we have pointed out that tax refund procedures under the 1954 Code are not relevant to bankruptcy. In addition, it may be noted that Section 57k of the Bankruptcy Act, as amended, permits a claim to be reconsidered upon application by the trustee or any creditor or the bankrupt, as follows:

Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed.

There is no comparable provision in the 1954 Code which authorizes a reconsideration of a tax refund claim which previously had been allowed. Moreover, even if it were relevant, which we deny, the

4/ [Continued]

applied Rule 15(a) to proofs of claim filed by creditors, and states that a creditor may file an amendment to his proof of claim without leave of the referee if the trustee previously had not objected to the claim. See 3 Collier on Bankruptcy, supra, Sec. 57.11, p. 179. In the present case the trustee did not file any objection until after the Government's amendment of December 22, 1966, had been filed. (I-R. 58, 61.) Moreover, neither the trustee's first report nor the referee's order on the report which authorized the payment of a dividend (I-R. 59-60) (which was filed one day after the Government's amended claim) objected to the amended claim.



trustee is mistaken in contending that the Government's original claim and its January 21, 1966, amendment had been allowed because the trustee was in process of paying it. The referee's order authorizing a payment of dividends was not filed until December 23, 1966, one day after the filing of the Government's amended claim on December 22, 1966. Moreover, there is nothing in the record to show that the trustee had filed a final account, and that the referee had approved such an account and had discharged the trustee. Hence, the bankruptcy estate was not closed when the Government filed its December, 1966, amended claim.

D. The equities support the Government's right to amend its proof of claim

There is an additional reason, completely apart from the application of Section 57n, why the Government may amend its proof of claim in this case. The trustee filed a petition on June 14, 1965 (I-R. 31-42), and the referee issued findings of fact, conclusions of law and a judgment on November 1, 1965, which held that the corporations were the alter ego of the bankrupt and which authorized the trustee to take the assets of the corporations into his possession and administer them as assets of the bankrupt's estate (I-R. 43-55).

There is no justification for the trustee's contention (Br. 27) that if taxes are owing for 1963 and 1964 because of improper returns filed by the corporation, the Government should

be restricted to pursue its remedies only against it. Such a contention completely overlooks the legal consequences of the referee's judgment. If the trustee brings a proceeding pursuant to his powers under Section 70 of the Bankruptcy Act, as amended (11 U.S.C. 1964 ed., Sec. 110), to recover certain assets into the bankruptcy estate on the ground that the corporations were alter egos of the bankrupt, such a judgment would collaterally estop the Government from treating the corporations as separate entities for the same years. See Coleman v. Alcock, 272 F. 2d 618 (C.A. 5th). Moreover, the trustee's contention completely ignores the practical effect of the referee's judgment, which was to deplete completely the corporation's assets, and to preclude any recovery by the Government against them. Finally, the trustee's contention also misapprehends the nature of the Government's amended claim. This claim is not for corporation taxes owed by these companies; instead, the Government has determined a deficiency in personal income taxes owed by the bankrupt.

The trustee also contends (Br. 26), that the Government should not be entitled to file an amended claim for taxes which did not exist until more than six months after the first meeting of creditors. The short answer to this contention is that the Government's claim is the logical consequence of a proceeding instituted by the trustee only after the expiration of the

six-month period, so that these amounts are a proper subject matter of an amended proof of claim.

Finally, the trustee contends (Br. 27) that the Government's amended claim should not be allowed because it was filed more than thirteen months after the referee filed the alter ego judgment. This contention is refuted by testimony of the revenue agent that prior to December 21, 1966, he did not know, and the trustee had not advised him, that the latter had recovered any assets of the corporations into the bankruptcy estate, as follows (II-R. 30-31):

Q Mr. Meyers, when were you advised that the Trustee had recovered assets belonging to H. & M. Distributing Company?

A December of 1966.

Q And who advised you of this?

A Mr. Bumb.

Q And was this by telephone?

A Yes, sir.

Q Would you state to the court what your filing procedures were in following up this advice?

A Well, Mr. Bumb had told me that he had received the money from this bank account in Carson City and was about to make distribution of the assets. I then called Judge Walker and told him that it was my understanding that distribution was to be made and that there were additional tax liabilities, and I asked him from the court standpoint what procedures I could follow, and he referred me to our Special Procedures section.

Q and would you --

THE REFEREE: The last comment brought it back to my recollection.

Q BY MR. STERN: Would you state what the filing procedures were after the advice from Judge Walker?

A I then contacted our Special Procedures section and they told me that if I had my report written and up to them immediately that they would file an amended proof of claim. So at that point I wrote my report and brought it in, and Special Procedures tookit [sic] from there.

Q Mr. Meyers, now, does the date December 21, 1966 sound familiar with respect to the information received from Mr. Bumb?

A Yes, sir, I think that was the day I talked to Mr. Bumb on the telephone.

Q Now, prior to that date had you had any information at all concerning the assets of H. & M. Distributing Company?

A I knew that Mr. Bumb had taken assets and disposed of them, liquefied them. I also knew of the ancillary proceedings taking place, but I didn't know that it had been brought to a successful conclusion and the money was in the hands of Mr. Bumb until I talked to him on that date.

Q You did not know that there were any assets at all until that date; is that correct?

A Yes, sir.

Under the circumstances it would be inequitable to deny the Government an opportunity to file an amended claim for income earned in 1963 and 1964. This is fully in accord with Bank of Marin v. England, 385 U.S. 99, in which the Court recently stated that (p. 103) "There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction", and cited its earlier opinion in Pepper v. Litton, 308 U.S. 295, wherein it had stated as follows (pp. 304-305, fn. 11):

And even though the Act provides that claims shall not be proved against a bankrupt estate subsequent to six months after the adjudication, the Bankruptcy Court in the exercise of its equitable jurisdiction had power to permit claims to be proved thereafter in order to prevent a fraud or an injustice.

CONCLUSION

For the reasons stated, the order of the District Court is correct and should be affirmed by this Court.

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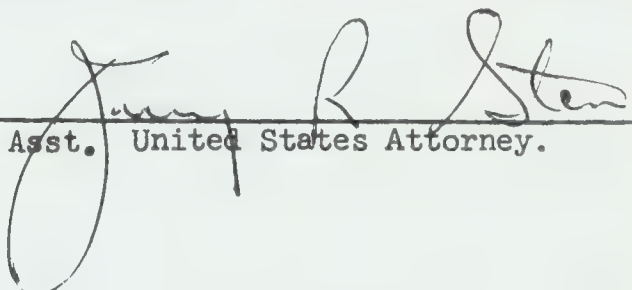
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APRIL, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: this 15th day of April, 1968.



Asst. United States Attorney.

No. 22447.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. BUMB, Trustee of the Estates of WM. H. MECOM,
and ZETTYE M. MECOM,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERNAL REVENUE
SERVICE,

Appellee.

On Appeal From the United States District Court for the
Central District of California.

BRIEF FOR APPELLANT.

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FILED

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TOPICAL INDEX

| | Page |
|---|------|
| Jurisdictional Statement | 1 |
| Statement of the Case | 2 |
| Specification of Errors Relied On | 4 |
| Questions Presented | 4 |
| Summary of Argument | 5 |
| Argument | 6 |

I.

| | |
|---|---|
| The Subject Claim Is a New Claim Filed After the Expiration of Six Months From the First Meeting of Creditors and May Not Be Allowed | 6 |
|---|---|

II.

| | |
|---|---|
| In Determining Whether the Subject Claim Is a Permissible Amendment, the Internal Revenue Service Is to Be Treated No Different Than Any Other Creditor and Therefore Decisions Involving Non-Tax Claims Are Authoritative | 7 |
|---|---|

III.

| | |
|--|----|
| In Determining Whether the Subject Claim Is a Permissible Amendment, Decisions Involving Claims Against Internal Revenue Service for Refund of Taxes Are Relevant | 11 |
|--|----|

IV.

| | |
|---|----|
| In Determining Whether the Subject Claim Is a Permissible Amendment, Rules of Pleading Should Be Followed | 15 |
|---|----|

ii.

V.

Page

| | |
|--|----|
| Once a Claim Has Been Filed and Allowed It Can- not Thereafter Be Amended | 18 |
|--|----|

VI.

| | |
|---|----|
| The Case of Menick v. Hoffman, 205 F. 2d 365 (9th Cir., 1953) Is Not Controlling | 20 |
| Conclusion | 28 |

TABLE OF AUTHORITIES CITED

| Cases | Page |
|--|------------------------|
| Continental Motors Corporation v. Morris, 169 F. 2d 315 | 22 |
| Fiegel, In re, 22 F. Supp. 364 | 11 |
| 4-D Engineering Corporation, In re, in Bankruptcy No. 91718-TC | 23, 24, 25 |
| G. L. Miller & Co., 45 F. 2d 115 | 9, 11, 21, 22, 23 |
| Glazer, Louis J., In re, 95 F. Supp. 472 | 7, 20 |
| Gyromill, Inc., In re, in Bankruptcy No. 91717-TC (USDC, SD Cal.) | 23, 24, 25 |
| Harmack Produce Co., In re, 44 F. Supp. 1 | 8, 20 |
| Heberlein Patent Corporation v. United States, 38-1 U.S.T.C. 9648, 23 A.F.T.R. 1132 | 18, 20 |
| Menick v. Hoffman, 205 F. 2d 365 | 3, 4, 5, 20, 22 |
| | 23, 24, 26, 27, 28, 29 |
| Mutual Life Insurance Company of New York v. United States, 49 F. 2d 662 | 13 |
| National Cattle Loan Co. v. United States, 62 F. 2d 168 | 11, 12 |
| New York v. Schneider, 162 F. 2d 847 | 22 |
| Petrich, In re, 43 F. 2d 435 | 6 |
| The Henderson Company v. United States, 36-1 U.S.T.C. 9831, 17 A.F.T.R. 1084 | 18, 20 |
| Tuffy v. Hammer, 145 F. 2d 447 | 18 |
| United States v. Andrews, 302 U.S. 517, 82 L. Ed. 398, 58 S. Ct. 315 | 15 |
| United States v. Henry Prentiss & Co., 288 U.S. 73.. | 11 |
| United States v. Roth, 164 F. 2d 575 | 21 |

| | Page |
|--|------------|
| Wausau Sulphate Fiber Co. v. United States, 49 F. 2d 665 | 17 |
| Wheeling Valley Coal Corporation v. Mead, 171 F. 2d 916 | 9 |
| Wilson v. United States, 246 F. Supp. 613 | 13, 14, 15 |

Miscellaneous

| | |
|--|---|
| Senate Report No. 1916, 75th Cong., 3rd Sess. 5 (1938) | 7 |
|--|---|

Statutes

| | |
|--|------------------------------|
| Bankruptcy Act, Sec. 23 | 2 |
| Bankruptcy Act, Sec. 24 | 2 |
| Bankruptcy Act, Sec. 38 | 2 |
| Bankruptcy Act, Sec. 39(c) | 2 |
| Bankruptcy Act, Sec. 57(f) | 2 |
| Bankruptcy Act, Sec. 57(n) .. | 2, 3, 4, 5, 6, 7, 20, 22, 28 |
| Internal Revenue Code of 1954, Sec. 6511 | 14 |
| United States Code, Title 11, Sec. 46 | 2 |
| United States Code, Title 11, Sec. 47 | 2 |
| United States Code, Title 11, Sec. 66 | 2 |
| United States Code, Title 11, Sec. 67 | 2 |
| United States Code, Title 11, Sec. 93 | 2, 6, 7, 22 |

Textbooks

| | |
|--|---|
| 3 Collier on Bankruptcy (14th Ed.), p. 180 | 6 |
| 3 Collier on Bankruptcy (14th Ed.), p. 182 | 6 |
| 3 Collier on Bankruptcy (14th Ed.), p. 186 | 6 |
| 3 Collier on Bankruptcy (14th Ed.), p. 385 | 7 |
| 67 Harvard Law Review, p. 885 | 7 |

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IN THE
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A. J. BUMB, Trustee of the Estates of WM. H. MECOM,
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UNITED STATES OF AMERICA, INTERNAL REVENUE
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Appellee.

On Appeal From the United States District Court for the
Central District of California.

BRIEF FOR APPELLANT.

Jurisdictional Statement.

This is an appeal from an Order Affirming Order of Referee, entered by the United States District Court, Central District of California, September 27, 1967 [R. 81]. Appellant filed an objection to claim of United States of America, Internal Revenue Service, filed in the bankruptcy proceedings [R. 61]. Pursuant to stipulation, the Referee granted a separate hearing on the issue of whether the late-filed claim of Director of Internal Revenue was a permissible amendment [R. 64]. The Referee ruled that claims 7, 8 and 9 filed by the District Director of Internal Revenue were permissible amendments to an existing claim [R. 63-68] and,

on July 19, 1967, made an order overruling appellant's objection to the amended claims [R. 70]. Appellant filed a timely Petition for Review and the United States District Court affirmed the order of the Referee [R. 81]. Timely notice of appeal was filed by appellant on October 24, 1967. The Referee's jurisdiction was based on Section 57(f) of the Bankruptcy Act (11 U.S.C. §93), and Section 38 of the Bankruptcy Act (11 U.S.C. §66). Jurisdiction of the United States District Court was invoked pursuant to Section 39(c) of the Bankruptcy Act (11 U.S.C. §67), and this Court has jurisdiction pursuant to Sections 23 and 24 of the Bankruptcy Act (11 U.S.C. §§46, 47).

Statement of the Case.

During the course of administration of the bankruptcy an action was brought by the trustee against H & M Distributing Co., Inc., and H & M Freight Co., a fictitious name under which said corporation did business, to declare that H & M Distributing Co. was the *alter ego* of the bankrupt [R. 31]. Thereafter, on November 1, 1965, the court found that the corporation was the *alter ego* of the bankrupt and ordered all of the assets of the corporation turned over the trustee for administration [R. 43, 53].

On October 12, 1964, the First Meeting of Creditors took place, and within the six month period provided by Section 57(n) of the Bankruptcy Act (11 U.S.C. §93), the Internal Revenue Service filed a claim for Internal Revenue taxes in the sum of \$6,838.41 [R. 56].

On January 24, 1966, the Internal Revenue Service filed an amended claim reducing the original amount to \$6,292.82 [R. 57].

On December 22, 1966, the Internal Revenue Service filed another amended claim for Federal Income Taxes owed by the Bankrupt for the years 1963 and 1964, which claim was based primarily on the *alter ego* judgment and recovery by the trustee [R. 58]. Thereafter, and on March 9, 1967, the Internal Revenue Service filed an additional claim consolidating those previously filed and adding thereto Excise taxes in the sum of \$591.57 [R. 62]. All of these amended claims were filed subsequent to the six month period set forth in Section 57(n) of the Bankruptcy Act.

Prior to the filing of the amended claim (December 22, 1966), the trustee filed his First Report and Account and Petition to Pay Expenses of Administration, etc.; the same was heard by the Referee on December 19, 1966, and on December 23, 1966 the Referee signed Findings of Fact, Conclusions of Law, and Order *re* Net Realization and Approving First Report and Account of Trustee, etc. [R. 59]. Pursuant thereto, the trustee was ordered to pay attorney's fees, trustee's fees and certain disbursements as expenses of administration, and dividends on the filed and allowed priority claims and on the general, unsecured claims.

Objections to the amended claims were filed by the trustee based upon the late filing [R. 61].

The Referee overruled the objections of the trustee and held that they were proper amendments of the original claim although they set up new and distinct tax claims [R. 63, 70].

The Referee made this ruling upon the authority of *Menick v. Hoffman*, 205 F. 2d 365 (9th Cir., 1953), believing that he was bound by the decision in that case [R. 67, 68] [Tr. 89].

Specification of Errors Relied On.

1. The Referee's ruling that *Menick v. Hoffman, supra*, was controlling and therefore, as a matter of law, the amended claims of Internal Revenue Service were permissible, was clearly erroneous, and the District Court erred in affirming the Referee's order.

2. The Referee's Conclusion of Law that the taxes described in the amended claims were of the same basic ground for recovery and of the same generic origin was clearly erroneous, and the District Court erred in affirming the Referee's order.

3. The Referee's Conclusion of Law that the amended claims of Internal Revenue Service were not entirely new, different, separate and distinct claims was clearly erroneous, and the District Court erred in affirming the Referee's order.

4. The District Court erred in affirming the Referee's order overruling appellant's objections to the amended claims of the Internal Revenue Service.

Questions Presented.

1. Whether *Menick v. Hoffman, supra*, is controlling in the situation here presented, and required the Referee to rule as a matter of law that the late-filed claims were permissible amendments.

2. Whether the Internal Revenue Service may amend a timely filed claim subsequent to the six-month period set forth in Section 57(n) of the Bankruptcy Act where the original claim is based upon taxes owing by the bankrupt for the years 1961 and 1962, and the amended claims are for the years 1963 and 1964, and

based primarily on an *alter ego* judgment against a corporation not in bankruptcy and a recovery by the trustee of certain assets of the *alter ego* corporation.

Summary of Argument.

The Referee was mistaken when he determined that *Menick v. Hoffman, supra*, required him to overrule appellant's objections to the government's claims. The government made the new assessments which formed the basis for the amended claims by disregarding the corporate existence of H & M Distributing Co., Inc. and treating the income and expenses of the corporation as income and expenses of the bankrupt. They did this after appellant obtained a judgment of *alter ego* against the corporation and recovered certain of its assets. This basis for assessing a tax is entirely new and distinct from that which was set forth in the original proof of claim. No such situation was before the court in *Menick v. Hoffman, supra*.

The courts have laid down various guidelines to assist referees in determining whether or not an amendment is an entirely new claim which cannot be allowed if filed later than the period prescribed in Section 57(n) of the Bankruptcy Act. If the Referee had applied these guidelines, he should have sustained appellant's objection to the government's claims.

ARGUMENT.

I.

The Subject Claim Is a New Claim Filed After the Expiration of Six Months From the First Meeting of Creditors and May Not Be Allowed.

Section 57(n) of the Bankruptcy Act (11 U.S.C. §93) provides that all claims, including claims of the United States, must be filed within six months after the date of the First Meeting of Creditors, provided that the court may grant the United States a reasonable extension of time for filing such claims. No such extension was requested or granted in these proceedings. It is however, well settled that amendments to claims timely filed may be that allowed but are within the discretion of the court, as the justice of the case demands. 3 *Collier on Bankruptcy*, 14th Ed., p. 182; *In re Petrich*, 43 F. 2d 435 (USDC, SD Cal., 1930).

“Amendments subsequent to the time allowed for the filing of proofs of claims call for closer scrutiny in order to make sure that the amendment does not disguise an attempt to file an entirely new claim, in violation of the statutory time limitation.” 3 *Collier on Bankruptcy*, 14th Ed., p. 180.

“Yet in view of the time limitation imposed by Section 57 on creditors for filing their proofs of claim, courts have been watchful not to allow a too liberal administration of the rule on amendments to nullify the legislative policy. Hence amendments offered after expiration of the statutory six-month period will be more closely scrutinized. They must be genuine amendments as against entirely new claims.” 3 *Collier on Bankruptcy*, 14th Ed., p. 186.

The appellant contends that the claim in question is a new and different claim and not a permissible amendment. It is obvious that Internal Revenue Service was aware of the legal problems involved as they designated the claim in question a "Supplemental Proof of Claim dated January 21, 1966." Obviously, Internal Revenue Service sought to avoid designating the claim as an "amendment" by using the word "supplemental", thereby hoping to tack his new claim on the prior claim which is not in question.

II.

In Determining Whether the Subject Claim Is a Permissible Amendment, the Internal Revenue Service Is to Be Treated No Different Than Any Other Creditor and Therefore Decisions Involving Non-Tax Claims Are Authoritative.

Prior to the adoption of the Chandler Act in 1938, the six month time limitation was held inapplicable to federal and state governments. Section 57(n) of the Bankruptcy Act (11 U.S.C. 93) was amended in 1938 so that governmental claims are now expressly included within the six month rule. It is clear that Congress intended the government to be treated on the same basis as other creditors and therefore cases dealing with the right of creditors to amend claims, and the reasons for permitting or denying such amendments, apply equally to the government in asserting tax claims. *Senate Report No. 1916*, 75th Cong., 3rd Sess. 5 (1938) states in part as follows: "The Committee agrees with the proposal that governmental claims should be subjected to the same requirements as other claims. . . ." See 3 *Collier on Bankruptcy*, 14th Ed., p. 385; 67 *Harvard Law Review* 885; *In re Louis J. Glazer*, 95 F. Supp. 472 (USDC, D Mass., 1951);

In re Harmack Produce Co., 44 F. Supp. 1 (USDC, SD NY, 1942).

Before examining the decisions, it should be noted that the basis for the subject claim is not merely income taxes for different years than those set forth in the original claims. The deficiency letter and the explanation of items state that the bankruptcy court determined that H & M Distributing Co., Inc. was the *alter ego* of the bankrupt and therefore the corporation was disregarded as a separate entity for tax purposes and the bankrupt's taxes for the years 1963 and 1964 were redetermined as though no corporation existed [Trustee's Ex. A]. The Preliminary Statement prepared by the revenue agent states: "The principal cause of change was the addition of income and expenses of H & M Distributing Co., Inc. to the income and expenses of the taxpayer." While appellant believes that this is not a proper ground for redetermining taxes under the Internal Revenue laws, this question is beyond the scope of the appeal as it involves the merits of the amended claims. However, when it disregarded the corporation in assessing the taxes for 1963 and 1964, the government adopted an entirely new and different basis from that which formed the basis for the original claim. The original claims were made on the theory that the bankrupt did not properly prepare his returns for the years 1961 and 1962 and therefore a deficiency was assessed. Those claims were in no way related to the existence or non-existence of the corporation. The subject claim adopts an entirely new theory, namely that in view of a court's determination that the corporation was the *alter ego* of the taxpayer, Internal Revenue Service may disregard the corporate existence and treat all income and expense of

the non-bankrupt corporation as the income and expense of the bankrupt individual.

The leading case dealing with amendments to claims is *Wheeling Valley Coal Corporation v. Mead*, 171 F. 2d 916 (4th Cir., 1949). There, a creditor filed claims against the receiver for damages caused during the receivership proceedings. After the time for filing claims had expired, the creditor filed an amended claim against the bankrupt for breach of contract. The claim was disallowed. The creditor contended that the original claim against the receiver set forth the breach of contract by the bankrupt. The court stated, at page 920:

“A sufficient answer to this is that the specific items embraced in the original claim are so radically different from those of the amended claim as to negative any contention that they relate to the same facts and ground of liability.”

Applying this rule to the facts of the subject case, it is obvious that the specific items embraced in the original claim, additional income taxes for the years 1961 and 1962, are radically different from those of the subject claim, additional taxes for the years 1963 and 1964, and the ground for liability, to wit, a disregard of the corporate entity in determining the taxes of the individual, are new and distinct from the grounds upon which the original claim was founded.

The distinguished Second Circuit Court of Appeals stated several guidelines in the case of *G. L. Miller & Co.*, 45 F. 2d 115 (2nd Cir., 1930). Speaking for L. Hand and A. Hand, Judge Swan stated at page 116:

“[The modern decisions] permit amendments to correct defects of form, or to supply greater partic-

ularity in the allegations of fact from which the claim arises, or to make a formal proof of claim based upon facts which, within the statutory period, had already been brought to the notice of the trustee by some informal writing or some pleading in the bankruptcy proceedings. It is quite another matter to use an 'amendment' as a device for filing after the statutory period a claim based upon a cause of action of which no notice had been given the trustee by anything previously filed. This distinction has been recognized by high authority."

Applying these guidelines to the subject claim, it is obvious that the amended claim did not purport to correct any defects of form in the original claim, nor did it purport to supply greater particularity in the allegations of fact from which the original claim arose. Likewise, no informal writing or pleading had been filed by Internal Revenue Service during the bankruptcy proceedings which gave notice to the trustee of the existence of the claim here in question. The Referee expressly found that appellant did not have actual notice of the subject claim until after it was filed on December 22, 1966 [R. 66, 67], and the trustee's testimony in support of this finding was uncontroverted [Tr. 10]. Internal Revenue Service is attempting to use an amendment as a device for filing a claim after the statutory period has elapsed. To hold that the trustee must assume such claims from the fact that the court determined an *alter ego* situation in one proceeding would require the trustee to be on notice that any creditor could assert the *alter ego* determination as the basis for a late claim. Such a result might delay indefinitely the orderly administration of the bankrupt's estate.

III.

In Determining Whether the Subject Claim Is a Permissible Amendment, Decisions Involving Claims Against Internal Revenue Service for Refund of Taxes Are Relevant.

The *Miller* case, *supra*, was followed with approval in *In re Fiegel*, 22 F. Supp. 364 (USDC, SD NY, 1937). The court, at page 365, stated as follows:

“Amendments to claims in bankruptcy are freely allowed where the purpose is to cure defects in the claim originally filed, to supply greater particularity to the claim, or even to plead a new theory on facts already given in the claim. They are not permitted where the effort is to substitute an entirely different cause of action after the time for filing claims has expired.”

The court then noted that the theory on which a claim may or may not be amended is analogous to that wherein a party makes a claim for refund of taxes, and the court states, at page 365: “A distinction quite similar is taken on amendments of claims for refund of taxes,” citing *United States v. Henry Prentiss & Co.*, 288 U.S. 73. An examination of refund cases will disclose the position taken by Internal Revenue Service on amendments to claims after the statute of limitations has run; the decisions of the courts in such cases, and the rules on which the courts have relied in order to determine when a claim may be amended after the time for filing such claims has expired.

National Cattle Loan Co. v. United States, 62 F. 2d 168 (7th Cir., 1932). The taxpayer filed a claim for refund alleging that the corporation had included in its taxable income certain items that were not income and

had failed to take losses sustained and expenses incurred. After the time for filing claims had expired, the taxpayer filed an amended refund claim alleging that one of its borrowers was adjudicated a bankrupt and that the trustee had prevailed in an action to declare a loan usurious. As a result of this action, the taxpayer had never received interest income which it previously reported on the accrual basis and on which accrued and unpaid income the taxpayer had paid taxes. Likewise, the amended claim included the losses sustained as a result of the successful action brought by the trustee in bankruptcy. The Commissioner of Internal Revenue denied the amended claim for refund and the taxpayer brought suit in the district court. A demurrer was sustained and on appeal the Seventh Circuit affirmed, holding that the purported amendment setting forth the facts was not filed until the statute of limitations had run on claims for refund and the court ruled that the amendment of the claim to set forth the fact that the taxpayer had never received the income which it had previously reported, was a new claim and not a valid amendment of a previous claim. The court stated at page 170: "If an amendment is filed after the expiration of the period of limitations setting up an entirely new cause of action it is barred by the statute notwithstanding the original plea was filed in time." Thus, although the original claim was broadly stated (taxable income had included items that were not income and losses sustained and expenses incurred were not taken), the court held that the amended claim was in reality a new claim.

It is interesting to note that in the *National Cattle Loan Co.* case, *supra*, the court adopts a rule identical

to the rule found in bankruptcy cases. At page 171 the court states:

"One object of such requirement [the filing of a claim as a prerequisite to a suit to recover taxes paid] is to advise the appropriate officials of the demand or claim intended to be asserted, so as to insure an orderly administration of the revenue . . . the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded."

Mutual Life Insurance Company of New York v. United States, 49 F. 2d 662 (Court of Claims, 1931). The taxpayer filed a claim for refund on certain grounds and after the claim was rejected by Internal Revenue Service it filed an amended claim on different grounds. The court, at page 664, stated:

"To hold that a claim for refund made on a specific ground may, after it has been considered and rejected, be amended or enlarged so as to include an entirely different ground, and to claim a much larger refund than that asserted in the original claim, would be to permit an indefinite postponement from the limitation for bringing suit and would nullify the provisions of the statute as to the time within which claims may be filed and the time within which suit may be brought."

In *Wilson v. United States*, 246 F. Supp. 613 (ND Cal., 1965), a recent case decided by the Northern District of California, the taxpayer had formed a limited partnership in 1953. For several years the books and records of the partnership were not kept to reflect for-

mation of the limited partnership, but were instead kept on the same basis used prior to 1953. In the formation of the limited partnership, the taxpayer had given interests in the business to his children and others.

The taxpayer filed a claim for refund seeking a deduction from his income of the interests of two of his children in the limited partnership, which interests had been reported on the taxpayer's return. Thereafter, and after the statute of limitations had run on the filing of refund claims for the subject years, the taxpayer filed amended claims for refund identical to the original claims except that he asked for a credit for the amount of income that was allocated to other limited partners not specifically named in his original claim. The claims were denied and the taxpayer sued in the district court. The court reviews Section 6511 of the Internal Revenue Code of 1954 governing the amendment of claims and states at page 620 that:

"There is nothing in the language of Section 6511 which permits the 'tacking on' of a claim filed late to a claim that was timely filed in order to give the former the lively status of the latter. Even though the 'amended claims' *involved a part of the same tax with which the timely claims were concerned, they cannot be given life by ancestry. They were filed too late and are dead.*" (Emphasis added.)

Appellant submits that the *Wilson* case is virtually identical to the subject case recognizing that, as hereinabove shown, the government is to be treated the same as any other creditor and that an analogy to refund cases is proper when determining the permissibility of

amending a claim in bankruptcy. If the position taken by Internal Revenue Service in the *Wilson* case, opposing the amended claim of the taxpayer, is sound (and this position was sustained by the District Court for the Northern District of California in 1965, *Wilson v. United States, supra*), the position taken by the appellant in this case is no different from the position taken by Internal Revenue Service in the *Wilson* case. Clearly, Internal Revenue Service could not file a claim in these proceedings for the 1963 and 1964 taxes because the period of limitations has expired. In seeking to avoid the application of a rule which Internal Revenue Service itself has adopted and successfully sustained in the courts for years, it has attempted to tack on to the allowed claim covering 1961 and 1962 a claim for different years and based upon a different theory. In the words of the court which sustained the government's position: "Even though the amended claims involved a part of the same tax with which the amended claims were concerned, they cannot be given life by ancestry. They were filed too late and are dead." *Wilson v. United States, supra*.

IV.

In Determining Whether the Subject Claim Is a Permissible Amendment, Rules of Pleading Should Be Followed.

In addition to applying rules adopted in refund cases, the courts have held that rules of pleading are helpful to determine whether or not a claim is a permissible amendment or a new claim. The leading case is *United States v. Andrews*, 302 U.S. 517, 82 L. Ed. 398, 58 S. Ct. 315 (1938), involving a tax refund claim. The taxpayer filed a claim for refund on a specific ground,

namely a loss during the taxable year due to the worthlessness of certain stocks. The claim was rejected in part and allowed in part. After the period for filing refund claims had elapsed, the taxpayer filed an amended claim asserting the taxpayer had reported dividend income which should have been reported as a capital gain. The Commissioner conceded that an overpayment had been made but denied the refund on the grounds that the amended claim was wholly unrelated to the earlier claim and was made on different grounds. The taxpayer brought suit in the Court of Claims, was successful, and the Supreme Court reversed. At page 520, the Court said: "We hold that the so-called amendment was in fact a new claim and its allowance was barred by the statutory provision limiting the time for presentation of claims for refund." The Supreme Court reviews several conflicting decisions and at page 524 lays down certain guidelines:

"In all these cases the court found the analogies of pleading helpful in deciding whether the claim was in such form as to be subject to the proffered amendment at a time when a claim wholly new would have been barred; but the opinions point out that the analogy to pleading at law is not to be so slavishly followed as to ignore the necessities and realities of administrative procedure. Where a claim which the Commissioner could have rejected as too general, and as omitting to specify the matters needing investigation, has not misled him but has been the basis of an investigation which disclosed facts necessary to his action in making a refund, an amendment which merely makes more definite the matters already within his knowledge,

or which in the course of his investigation, he would naturally have ascertained, is permissible. On the other hand, a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim.”

A similar rule may be found in *Wausau Sulphate Fiber Co. v. United States*, 49 F. 2d 665 (Court of Claims, 1931). The court at page 667 states:

“ . . . in determining whether it [an amended claim] operates to prevent the application of the statute of limitations we think a rule of pleading should be followed, especially as this rule is based on logic and reason. It is well settled that where a cause of action is defectively pleaded, an amendment not changing the cause of action but curing these defects does not make the cause of action subject to the statute of limitations, even though the amendment be filed after the expiration of the period thereof. On the other hand, if an amendment is filed after the expiration of the period of limitations setting up an entirely new cause of action, it is barred by the statute, notwithstanding the original plea was filed on time.”

Applying these rules to the facts at hand, it is obvious that the original claim of Internal Revenue Service was based upon one fact situation and an investigation of the elements appropriate to that claim was determined affirmatively. However, the amended claim is based upon an entirely different set of facts and in-

volved matters which in the course of appellant's investigation of the original claim he would not have ascertained. Thus, the examination of the matters involved in the subject claim were not germane to the original claim and would require an entirely new and different examination.

V.

Once a Claim Has Been Filed and Allowed It Cannot Thereafter Be Amended.

The above rule is well settled in refund cases and once a taxpayer's claim for refund has been allowed, he cannot thereafter file an amended claim. Thus, in *Heberlein Patent Corporation v. United States*, 38-1 U.S.T.C. 9648, 23 A.F.T.R. 1132 (DC NY 1938) the taxpayer filed a claim for refund which was allowed. Thereafter, the taxpayer filed an amended claim which was disallowed. In each case the basis of the refund claim was an incorrect valuation of patents for purposes of computing depreciation. The court states the rule that after a claim has been allowed in full it is no longer subject to amendment. (To the same effect see *The Henderson Company v. United States*, 36-1 U.S.T.C. 9831, 17 A.F.T.R. 1084 [DC Okla., 1936]).

In *Tuffy v. Hammer*, 145 F. 2d 447 (2nd Cir., 1944), Judge Learned Hand, at page 450, said as follows:

"Mrs. Hammer next argues that §57, sub. n, grants priority only to claims that have been 'allowed,' and that, although in the case at bar the referees stamped the claims as 'filed,' it does not appear that they ever 'allowed' them. *In re Two*

Rivers Woodenware Co., 7 Cir., 199 F. 877, and *In re Branner*, 2 Cir., 9 F.2d 833, held that the bare 'filing' of a claim is not of itself an 'allowance'; a referee must do more than physically receive it. However, no court has ever held that an order of allowance is necessary; any act signifying that the referee has, not only actually received them, but has treated them as prima facie valid, will serve as an 'allowance.' To docket them is enough; and all the nine claims 'filed' with the first referee were docketed. It is true that the docket of the second referee does not appear in the record, and we cannot therefore tell whether he docketed the last three; yet they were 'proved' in due form and filed, and there is no evidence, as there was *In re Branner*, supra, 9 F.2d 883, that they had merely lain unnoticed in a basket. It seems to us therefore that the situation is within the general principal that when nothing appears to the contrary, official conduct is presumed to have been regular."

Appellant submits that under the above cited authorities, it is clear that a taxpayer cannot amend a claim for refund once it has been allowed by Internal Revenue Service if the time for filing claims for refund has expired, and that the same rule should be applied to the government in this case. Thus, the government's original claim, having been allowed, was no longer subject to amendment after the expiration of the six-month period.

Appellant had treated the government's original claim and first amendment thereto as allowed and was

about to pay it as a priority claim when the government filed its amended claim on December 22, 1966 [Tr. 4-6]. In fact, appellant actually prepared a check for said amount, together with an order for payment of dividends and delivered it to the Referee prior to the time when he received notice of the filing of the subject amended claim [Tr. 6-8]. It is beyond question that the government's claim in the sum of \$6,292.82 had been allowed at the time the government filed an amended claim for \$46,578.00 in additional taxes, and therefore the subject claim could no longer be amended. *Heberlein Patent Corporation v. United States, supra*; *The Henderson Company v. United States, supra*.

Such a rule is necessary for the orderly administration of tax cases and to enable taxes to be collected without prolonged delays and litigation. The same policy applies to the administration of bankruptcy cases, where the very purpose of the limitation of Section 57(n) is to speed up the closing of estates. *In re Louis J. Glazer*, 95 F. Supp. 472 (USDC, D. Mass., 1951); *In re Harmack Produce Co.*, 44 F. Supp. 1 (USDC SD NY, 1942).

VI.

The Case of *Menick v. Hoffman*, 205 F. 2d 365 (9th Cir., 1953) Is Not Controlling.

In the *Menick* case, Internal Revenue Service filed a timely claim for withholding taxes for the year 1950. After the six month period had expired, the Collector filed an amended claim for income taxes for the years 1944, 1945 and 1946. The trustee objected to the amended claims and his objections were sustained by the referee. Internal Revenue Service did not review

this decision, but the taxpayer sought a review and an appeal. The court at page 368 stated that the amended claim contained “only a statement of additional items amplifying a species of tax relationship and obligation that was asserted in the original claim and that continued to exist between the bankrupt and the sovereign taxing authority relative to internal revenue taxes.” Likewise, it found that the subject of each claim was of the “same generic origin.” In support of this ruling, the court relied on three cases.

In *United States v. Roth*, 164 F. 2d 575 (2nd Cir., 1948), a claim for taxes had been filed for the years 1939, 1942 and 1943. After the six-month period had expired, it was discovered that the year 1939 had been inserted inadvertently and that a clerical error had caused the claim to show taxes due for 1939 instead of the correct year, 1938. The court permitted the amendment and relied upon its decision in *G. L. Miller & Co.*, *supra*. At page 576, the court states:

“In harmony with the *Miller* case, we assume that the right to amend can go no further than to permit the bringing forward and making effective of that which in some shape was asserted in the original claim.”

The court also states at page 577 that:

“No one who knew the relations between the parties could fail to recognize that *the proof was intended to cover the taxes for 1938.*” (Emphasis added.)

The correctness of the *Roth* decision cannot be questioned but its application to the facts at hand would seem misplaced. It cannot be seriously contended by

Internal Revenue Service that its original claim was intended to cover all taxes that might at any time, prior to the closing of the bankruptcy proceedings, be found due from the bankrupt. If such were the case, the purpose of Section 57(n) of the Bankruptcy Act (11 U.S.C. §93) would be entirely frustrated. We are dealing here not with a clerical error but with a new and distinct tax for different years and on an entirely different basis from that set forth in the original claim.

In the *Menick* case, *supra*, this Court also relied on *Industrial Commissioner of New York v. Schneider*, 162 F. 2d 847 (2nd Cir., 1947). There, the Commissioner had filed a claim for taxes which contained the following reservation: "This claim is subject to change at the completion of an audit of the books and records of the corporation." After the audit, and after the period for filing claims had expired, the Commissioner filed an amended claim for additional amounts and in part for different periods than those set forth in the original claim. Again, the Second Circuit relied on its decision in the *Miller* case, *supra*, and stated that the tax liability was a single cause of action that could not be accurately computed until an inspection of the books and records of the corporation had been completed. In the present case, Internal Revenue Service made no such broad reservation in its original proof of claim, nor does it contend that a computation of the taxes could not be accurately made until an audit of the taxpayer's books was completed.

Finally, this Court, in the *Menick* case, *supra*, relied on *Continental Motors Corporation v. Morris*, 169 F. 2d 315 (10th Cir., 1948). The *Continental* case actually supports appellant's position, as there the late-filed

amended claim grew out of the same contracts and purchase orders as did the original claim and the creditor merely attempted by his amendment to increase the amount of the claim by adding additional items of damages. The court stated at page 316:

“We think the word claim is used in the sense of cause of action or ground for liability and that what the statute interdicts is setting up a new ground on which the claimant seeks to recover rather than an amendment of the amount for which recovery is sought.”

Applying this rule to the facts in question, it is clear that the claim which was the subject of the original proof is not the same claim that is the subject of the amended proof, as it sets up a new ground on which the claimant seeks to recover, namely, the disregard of a corporate entity and the assessment of taxes based upon an *alter ego* theory.

A review of these cases shows that the foundation for the decision in *Menick v. Hoffman*, *supra*, is *In re G. L. Miller & Co.*, *supra*, which appellant has heretofore discussed at length. But the test of the *Miller* case is whether the trustee was given notice of the substance of the amendment by the original claim. Applying this test to the present case, it is obvious that the amendment is not permissible.

The issues here in question were recently before Referee Ray H. Kinnison in the cases of *In re 4-D Engineering Corporation*, in Bankruptcy No. 91718-TC, and *In re Gyromill, Inc.*, in Bankruptcy No. 91717-TC (USDC, SD Cal.). In these two cases, the bankrupt had leased certain machinery on which the Los Angeles County Tax Collector had made assessments. Within

the six month period, the County filed a claim showing the assessment numbers, the assessment valuation, and the tax levied pursuant to each assessment. Nine months after the expiration of the time allowed for filing claims the County Tax Collector filed an amended claim for additional taxes based on assessments against equipment that was not referred to in its original claim. The County of Los Angeles relied heavily on *Menick v. Hoffman, supra*, the case on which the government primarily relies in this case, and contended that the original claim and the amended claims were of the same generic origin, to wit, taxes owed the County. The court held otherwise and in an excellent opinion written by Referee Kinnison (*In re 4-D Engineering Corporation* and *In re Gyromill, Inc., supra*, Memorandum Opinion, March 7, 1962), the rule of the *Menick* case was discussed. Referee Kinnison stated that the rule of the *Menick* case would permit an amendment "only if there is no change in the basic ground for recovery." He went on to state that:

"It seems clear, when the above test is applied, Claim No. 77 cannot form the basic ground for Claims No. 116 and 117. On the contrary, it appears that they are entirely new and different claims. The property upon which the assessments were made is entirely different from the property on which Claim No. 77 is based, and is owned by entirely different lessor-owners. This distinction was recognized by the Tax Collector as he most carefully assigned different assessment numbers to the machinery owned by the different lessor-owners, even though, as his records show, all of the machinery was located at [the bankrupt's place of business], on the date of the assessment."

The cases before Referee Kinnison and the case before this Court are in most respects identical, although the taxing agencies are different. Nevertheless, the principle involved are the same and there should be no distinction between claims filed by the County Tax Collector and claims filed by the Internal Revenue Service.

In the present case, the original claim filed by the government showed assessment number D-36648/64 for income taxes due from the bankrupt for the year 1961, and assessment number D-36649/64 for income taxes due from the bankrupt for the year 1962 [R. 56, 57]. The so-called amended claim refers to different assessment numbers as well as different years. The “supplemental proof of claim” filed December 22, 1966 is based upon assessment number D-31069/66 for the year 1963 and D-31070/66 for the year 1964 [R. 58, 62]. Not only were different assessments made, as was the case in *4-D Engineering Corporation* and *Gyromill, Inc.*, *supra*, but it further appears that the assessments for the additional taxes were not made until December 23, 1966, the day subsequent to the date on which the claims were filed [R. 62].

Appellant submits that these cases support his position herein and that the amended claims are on a different basic ground for recovery than that set out in the earlier claim. In the words of Referee Kinnison “This distinction was recognized by the Tax Collector, as he has most carefully assigned different assessment numbers . . .” (*In re 4-D Engineering Corporation*, in Bankruptcy No. 91718-TC, and *In re Gyromill, Inc.*, in Bankruptcy No. 91717-TC, Memorandum Opinion, March 7, 1962, SD Cal.).

It is the government's contention that once a claim has been filed based upon taxes owing by the bankrupt, they are permitted, under the authority of the *Menick* case, *supra*, to continue to file amended claims at any time prior to the closing of the estate, so long as the basis for the claim remains taxes owing to the government. On the other hand, appellant contends that the authorities herein cited set forth rules that govern the permissibility of amendments to be applied to all creditors without any special treatment being afforded to the government. The Referee specifically found that the basis for the amended claim was primarily the *alter ego* judgment and recovery of assets by appellant [R. 66], whereas the original claim was in no way based upon the *alter ego* judgment and in fact was filed prior to the Referee's Judgment Determining *Alter Ego*. The amended claims are based upon deficiencies assessed against William Howard Mecom primarily as a result of the adjudication in the bankruptcy court that H & M Distributing Co., Inc. was the bankrupt's *alter ego*. Whether or not this is a proper basis for filing a claim in these proceedings is beyond the scope of this review, as this question deals with the merits of the government's claim, as distinguished from the permissibility of the amendment. The question now before the Court is whether a claim for taxes which did not even exist until November 1, 1965, the date on which the Referee found that the corporation was the *alter ego* of the bankrupt [R. 43-55], is of the same generic origin, the same basic ground for recovery, and not entirely new, different, separate and distinct, from the earlier claim against the bankrupt for years other than those covered by the amended claim. Had the government sought to disregard the corporate entity and

treated the corporation and Mecom as one and the same prior to the commencement of the bankruptcy proceedings, a timely claim could have been filed and the Court would have had to determine whether disregarding the corporate entity was a proper basis for asserting a claim against the individual bankrupt. But the government did not take such action.

In this case, the government did not claim taxes against Mecom for the years 1963 and 1964 until more than thirteen months after the court had determined that the corporation was the *alter ego* of the bankrupt. The Referee did not find that H & M Distributing Co., Inc. was a non-existent entity and that the bankrupt and the corporation were one and the same. He merely determined that the assets of the corporation should be administered for the benefit of the creditors of the individual [R. 43-55]. There was no determination that the creditors of the corporation should be treated as creditors of the individual, nor has any proceeding been initiated with that objection. If the corporation's tax returns were improper the government would have claims against the corporation, but here the government has said that it will determine its claim for taxes as though the corporation never existed and pursue these claims against the individual alone.

Fundamentally, the government contends that all taxes owing to it regardless of their nature, the circumstances out of which they arose, the dates on which the liability was created, in other words, all taxes, are of the same generic origin and cannot be based upon different grounds or theories. Appellant submits that *Menick v. Hoffman, supra*, does not support such a position.

Conclusion.

The purpose of Section 57(n) is to afford creditors a reasonable time within which to file claims and at the same time permit the speedy and orderly administration of the bankrupt's estate. Without such a time limitation orderly administration would be impossible. It could be argued that creditors should be permitted to file claims and amended claims at any time prior to the closing of an estate or prior to the payment of dividends because the trustee might not be prejudiced by the late filing. However, this is not the law and appellant is aware of no case that has ever permitted a late claim on the grounds that the trustee has not been prejudiced as a result of the failure to file within the prescribed period.

If the government's position is sustained in this case, there is no reason why additional amended claims could not be filed until the estate is closed. Indeed, any creditor could file amended claims using the *alter ego* judgment as a basis therefor without regard to the grounds for their original claims. Conceivably, every creditor of the *alter ego* corporation could file a claim in this bankrupt's estate, even though such creditors had no claims against the individual bankrupt until more than a year after the commencement of the proceedings. Such a result would be chaotic and entirely frustrate the purpose of Section 57(n).

Appellant submits that the rule of *Menick v. Hoffman, supra*, if applied here in favor of the government, would open the door to countless so-called amended claims that would create an extreme burden upon trustees in bankruptcy and virtually abrogate Section 57(n).

Appellant disagrees with the Referee, who felt himself bound by *Menick v. Hoffman, supra*, but he endorses the Referee's statement that "I don't think that the ruling in the *Menick* case should extend to these circumstances . . ." [Tr. 89].

Respectfully submitted,

HILL, FARRER & BURRILL,

By JOHN J. WILSON,

Attorneys for Appellant.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN J. WILSON,

No. 22447

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. BUMB, Trustee of the Estates of Wm. H. MECOM
and ZETTYE M. MECOM,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERNAL REVENUE
SERVICE,

Appellee.

REPLY BRIEF FOR APPELLANT.

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TOPICAL INDEX

| | Page |
|--|------|
| Whether the Referee, in the Exercise of His Equitable Jurisdiction, Had the Power to Permit the Filing of the Government's Amended Claims Is Not a Question Presented by This Appeal | 1 |

TABLE OF AUTHORITIES CITED

| Cases | Page |
|--|------|
| Marin v. England, 385 U.S. 99, 87 S. Ct. 274, 17 L. Ed. 2d 197 | 2, 3 |
| Menick v. Hoffman, 205 F. 2d 365 | 1, 2 |
| Pepper v. Litton, 308 U.S. 295 | 3 |
| Statutes | |
| Bankruptcy Act, Sec. 57n | 3 |
| United States Code, Title 11, Sec. 93n | 3 |
| Textbook | |
| 3 Collier on Bankruptcy, Sec. 57.27 | 3 |

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UNITED STATES OF AMERICA, INTERNAL REVENUE
SERVICE,

Appellee.

REPLY BRIEF FOR APPELLANT.

Whether the Referee, in the Exercise of His Equitable Jurisdiction, Had the Power to Permit the Filing of the Government's Amended Claims Is Not a Question Presented by This Appeal.

Appellant believes that his opening brief adequately states his position on each of the errors relied on. This reply brief is limited to the points raised in the Government's brief wherein authorities are cited for the proposition that the Referee could have permitted the filing of the amended claims for equitable reasons [Br. 20-24]. Appellant submits that this question is not before the Court nor has it been considered by the Referee or the District Court. The Referee's Certificate on Review recites that "The basic question presented is whether the case of *Menick v. Hoffman, supra*, is controlling in the situation here presented." [R. 75].

Conclusion of Law I shows that the Referee based his decision solely on the authority of *Menick v. Hoffman*, 205 F. 2d 365 (9th Cir., 1953), and on no other ground [R. 67-68]. The basis for the Referee's decision can be found in the following words:

"I don't think that the ruling in the *Menick* case should extend to these circumstances, but I do feel bound by it, and that if the Circuit is going to determine that it does not so understand, the Circuit is going to have to be the one to reverse their ruling.

"So I am going to follow the *Menick* case and hold that since these came from the same generic origin, to-wit, taxes, that the amended claim should be filed; but I will also find, if you wish such a finding, that the Trustee had no notice of the pendency of this claim under the usual rules laid down, writings or assertions. You are familiar with those guidelines." [Tr. pp. 89-90].

There is nothing in the record of these proceedings on which the Government can base an argument for the application of the equitable principles asserted in its brief. To the contrary, the record is clear that Referee Walker was limiting the basis for his decision to the authority of *Menick v. Hoffman*, *supra*, believing that the decision in that case controlled the decision in this case.

In its argument before the Referee, its points and authorities filed with the District Court, and its brief before this Court, the Government continues to assert the doctrine of equitable jurisdiction as an alternative ground for sustaining the Referee's decision, citing *Bank of Marin v. England*, 385 U.S. 99, 87 S. Ct. 274,

17 L. Ed. 2d 197, and *Pepper v. Litton*, 308 U.S. 295. The great majority of courts have held that the bankruptcy court is without power to extend the time limit for filing claims upon equitable grounds short of outright fraud. 3 Collier, *Bankruptcy*, Section 57.27. There is nothing in the record from which the Referee could have found that the Government failed to file its amended claims within the six month period because of fraud by the trustee. To the contrary, the Referee specifically found that the trustee had no notice of the Government's additional claims until the amended claim was filed on December 22, 1966 [R. 66, 67].

The Government's real contention is that it should be permitted to file an amended claim after the six month period whenever a trustee in bankruptcy recovers assets which make such a claim more valuable. Stated another way, the Government would ask that a creditor be permitted to file claims at any time after the trustee recovers assets which had not come into the estate during the six month period on the ground that it would be inequitable to deprive a creditor of his right to participate in the distribution of such assets when their existence was not known within the six month period. Such a contention would completely destroy the purpose of Section 57n of the Bankruptcy Act (11 U.S.C. §93n), and would make the orderly administration of a bankrupt's estate virtually impossible.

Finally, appellant would point out that the Government makes assumptions regarding the assets of the alter ego corporation which are not supported by any evidence whatsoever. The Government states that the alter ego judgment completely depleted the corporation's assets [Br. 21]. There is no evidence in the record to

support this statement. Likewise, there is nothing in the record to indicate that the Government would be precluded from collecting tax claims against H & M Distributing Co., Inc., notwithstanding the alter ego judgment. Therefore, these erroneous assumptions of fact should not form the basis for applying equitable principles.

Appellant submits that the application of equitable doctrines to the questions before this Court is beyond the scope of the appeal and should not be considered. It is for the trial court and not the appellate court to exercise equitable powers and in this case the Referee declined to base his ruling on such powers, consequently this Court should likewise decline to base its decision on grounds other than those relied upon by the Referee.

Respectfully submitted,

HILL, FARRER & BURRILL,

By JOHN J. WILSON,

Attorneys for Appellant.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN J. WILSON

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE CHROMIAK, JR.,

Appellant,

v.

AROLD V. FIELD,

Appellee.

FILED

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLEE'S BRIEF

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TOPICAL INDEX

| | <u>Pages</u> |
|--|--------------|
| JURISDICTIONAL STATEMENT | 1 |
| STATEMENT OF FACTS | 1 - 2 |
| ARGUMENT | 3 - 8 |
| I APPELLANT HAS NOT SHOWN THAT HE HAS BEEN DENIED ANY RIGHT GUARANTEED EITHER BY THE UNITED STATES CONSTITUTION OR BY STATE LAW | 3 - 6 |
| A. Section 170.6 of the California Code of Civil Procedure, Though Not Applicable to the Present Case is Nonetheless Constitutional | 3 - 4 |
| B. Section 1203 of the Penal Code is Constitutional | 4 - 6 |
| II THE TRIAL COURT WAS NOT PREJUDICED AGAINST APPELLANT | 6 - 8 |
| CONCLUSION | 8 |
| CERTIFICATION | 9 |

LIST OF AUTHORITIES CITED

Pages

CASES

| | |
|--|---------|
| Johnson v. Superior Court, 50 Cal. 2d 693, 329 P. 2d 5 | 4 |
| People v. Chromiak, 4th Crim. 2212 | 2 |
| People v. Chromiak, 4th Crim. 2471 | 2,3,4,6 |
| People v. Connolly, 103 Cal. App. 2d 245, 229 P. 2d 112 | 5-6 |
| People v. Hohensee, 251 A.C.A. 196 | 2 |
| People v. Loeber, 158 Cal. 2d 730, 323 P. 2d 136 | 5 |
| People v. Wade, 53 Cal. 2d 322, 348 P. 2d 1167 | 6 |
| People v. Williams, 247 Cal. App. 2d 169, 55 Cal. Rptr. 434 | 5 |
| Sheppard v. Maxwell, 231 Fed. Supp. 37 | 8 |
| Thomason v. Klinger, 349 F. 2d 940 | 7 |

STATUTES

| | |
|------------------------|---------|
| Code Civ. Proc., § 170 | 3 |
| § 170.5 | 2, 3, 4 |
| § 170.6 | 3,4 |
| § 170.6, subd. (3) | 1,3 |
| § 1203 | 1,4,5 |

CONSTITUTION

| | |
|-------------------------|---|
| U.S. Const., Amend. XIV | 5 |
|-------------------------|---|

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE CHROMIAK, JR.,

Appellant,

v.

HAROLD V. FIELD,

Appellee.

No. 22449

APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

The United States District Court has jurisdiction to entertain a petition for a writ of habeas corpus pursuant to 28 U.S.C.A. § 2241.

STATEMENT OF FACTS

[As there was no evidentiary hearing below, the facts are taken from the records in the proceedings below.]

The petition below (USDC No. 67-973-Y) marks appellant's third challenge in the United States District Court for the Central District of California to his conviction for perjury in the Superior Court of the State of California.^{1/} He now contends that section 170.6, subdivision (3), of the California Code of Civil Procedure and section 1203 of the California Penal Code are

1. See USDC Nos. 66-344-Y and 66-47-C.

unconstitutional.

In the original case of People v. Hohensee, 251 A.C.A. 196 (1967), the People sought to convict Hohensee and another for conspiracy to defraud and to obtain money and property by false pretenses. Appellant here [Chromiak] was called by Hohensee as an expert witness in the criminal proceedings. As a result of his testimony appellant was charged with and convicted of perjury. He applied for probation which was denied. He was sentenced to imprisonment in the state prison, appealed this sentence, and was granted bail pending appeal. His conviction was affirmed by the Court of Appeal of the State of California, Fourth Appellate District. People v. Chromiak, 4th Crim. 2212.

Thereafter proceedings were instituted before the Honorable Gerald C. Thomas, Judge of the Superior Court of the State of California in and for the County of Los Angeles, to effect execution of the judgment. Appellant moved to disqualify Judge Thomas, under the provisions of section 170.5 of the Code of Civil Procedure of the State of California, from hearing further proceedings in the matter. The motion was heard by the Honorable Verne Warner and denied, and the case remanded to the trial court for sentencing. Appellant applied for probation which was again denied, and he was sentenced to prison for the term prescribed by law. From the orders denying his application for probation and his motion to disqualify the trial judge he appealed. On appeal, the rulings of the trial court were affirmed. People v. Chromiak, 4th Crim. 2471. (A copy of said opinion was attached to Response to Petition for Writ of Habeas Corpus, USDC No.

APPELLANT HAS NOT SHOWN THAT HE HAS BEEN DENIED
ANY RIGHT GUARANTEED EITHER BY THE UNITED STATES
CONSTITUTION OR BY STATE LAW

A. Section 170.6 of the California Code of Civil
Procedure, Though Not Applicable to the Present
Case is Nonetheless Constitutional.

Appellant challenges the constitutionality of section 170.6, subdivision (3), of the California Code of Civil Procedure, which sets forth the procedure whereby a party may disqualify a trial judge. This procedure, appellant contends, unfairly and unconstitutionally shifts the burden of proof to the moving party.

The constitutionality of section 170.6, however, has no bearing on the present case, as that statute did not come into play at the trial below. Appellant's motion to relieve the judge was made under section 170.5 of the California Code of Civil Procedure, not section 170.6, subdivision (3). People v. Chromiak, 4th Crim. 2471.

California law provides two means whereby a party may challenge the fitness of a judge to try a case. Under section 170 of the California Code of Civil Procedure, when the moving party makes his allegations of prejudice the matter is transferred to another court where a judge determines the truth of the allegations. Section 170.6, on the other hand, provides a means whereby a party may, in effect, peremptorily challenge a judge. Under this section a mere affidavit of prejudice will cause the removal of the judge from the matter. Such an

affidavit, however, has to be filed prior to the beginning of trial.

Appellant, however, did not follow the procedure of section 170.6 and make a peremptory challenge. In fact, he could not have made a section 170.6 peremptory challenge as his challenge was made at the conclusion of the trial. Appellant challenged the judge for prejudice, under section 170.5, and the court so treated his motion as a challenge for prejudice. Accordingly, appellant may not complain about the constitutionality of section 170.6 when he never used this statute at the trial below.

Be this as it may, the procedures established for the disqualification of trial judges in California courts are constitutional. Johnson v. Superior Court, 50 Cal. 2d 693, 329 P. 2d 5 (1958). While the burden of proof, to be sure, is shifted to the moving party, this is inevitable. It is the moving party who has something to prove, and until the moving party has proven otherwise, the judge is deemed fit and able to perform his duties. A court system could not function properly with a presumption of judicial incapacity, which apparently is what appellant wants.^{2/}

B. Section 1203 of the Penal Code is Constitutional.

Appellant also challenges the constitutionality of section 1203 of the Penal Code. More specifically, he

2. For a more complete discussion of the factual situation underlying appellant's attack on the disqualifying procedures, we refer this Court to the opinion in People v. Chromiak, 4th Crim. 2471. (A copy of said opinion was attached to Response to Petition for Writ of Habeas Corpus, USDC No. 67-973-Y.)

questions that portion of the statute which states:

"In unusual cases, otherwise subject to the preceding paragraph, in which the interests of justice would best be served thereby, the judge may, with the concurrence of the district attorney, grant probation."

Appellant does not indicate why he takes issue with this particular aspect of the State of California's probation system or why he finds this section has any relevance to his case. Insofar as can be determined from the record, appellant did not fall into that class of people otherwise ineligible for probation. Accordingly, the concurrence of the district attorney was not necessary to his admission to probation, and a resolution of the question he presents would not affect appellant's right. People v. Williams, 247 Cal. App. 2d 169, 172, 55 Cal. Rptr. 434 (1966).

In any event, the statute in question is constitutional and is not violative of the due process guarantees of the Fourteenth Amendment to the United States Constitution. The probation statute, to be sure, does not set any ostensible standards for the exercise of the district attorney's discretion in concurring in the granting of probation. Nor does the statute set any standards for the exercise of the judge's discretion. Yet it has been consistently held that although the granting of probation is entirely in the discretion of the trial judge, People v. Loeber, 158 Cal. App. 2d 730, 736, 323 P. 2d 136 (1958), his decision cannot be sustained where there is abuse of discretion. People v. Connolly, 103 Cal. App. 2d 245,

248, 229 P. 2d 112 (1951). The decision of a trial judge cannot be arbitrary or capricious but must be exercised within the spirit of the law. People v. Wade, 53 Cal. 2d 322, 338, 1 Cal. Rptr. 683, 348 P.2d 1167 (1959).

The exercise of the district attorney's discretion under this statute is bound by the same standards, and there is no reason to believe the appellate courts of the State of California will not examine the district attorney's use of his discretion as they examine the trial court's. There is nothing in the history or case law surrounding the statute to indicate the district attorney has absolute discretion. The discretion he does have is only sufficient to enable the probation laws to operate flexibly and effectively.^{3/}

II

THE TRIAL COURT WAS NOT PREJUDICED AGAINST APPELLANT

Appellant contends that the trial court's listening to a tape recording of a conversation he made was sufficient to establish that the trial court was prejudiced and that appellant was denied an impartial trial.

Appellant further seems to contend that the tape recording resulted from an illegal wire tap. He raises this point for the first time in this appeal. Neither his petition for a writ of habeas corpus nor any other pleadings he has

3. As to the cluster of facts underlying the matter of his request for probation, these, too, are set forth in the respondent's brief in People v. Chromiak, 4th Crim. 2471. (A copy of said brief was attached to Response to Petition for Writ of Habeas Corpus, USDC No. 67-973-Y.)

filed make mention of any wire tapping. This Court will not consider claims raised for the first time on appeal. Thomason v. Klinger (U.S.D.C. 9th Cir. 1965) 349 F. 2d 940.

The records of the trial do not reveal any illegal wire tapping. Rather, the record shows that the trial judge, in an affidavit, stated he had listened to the tape recording of a conversation between appellant and another person at a time when the judge believed the appellant had no attorney of record. At this point the judge was concerned about reducing the appellant's bail and felt that as this was a matter within the court's discretion, he had an obligation to inquire as fully as possible into all matters bearing relevantly upon the question of bail and the exercise of his discretion. A copy of Affidavit of the Honorable Gerald C. Thomas, Judge of the Superior Court, in and for the County of San Diego, State of California, filed in San Diego Superior Court Case No. CR-5926, is attached hereto as Appendix I.

While the court, perhaps, should not have heard evidence against appellant out of appellant's presence, he did so because he believed that appellant did not have counsel. This belief, even if erroneous, did not result from nor cause prejudice. It was what it was -- a mistaken belief. In any event, the trial court made no attempt to conceal from the appellant that he had heard this tape recording. The trial judge very candidly revealed to appellant what he knew.

There was nothing to indicate that the tape recording was illegally or improperly obtained, and appellant does not indicate how hearing this tape recording in fact prejudiced

the court. Appellant's counsel at trial did not believe that there was anything damaging in the recording (Rep. Tr. p. 10), while the judge indicated he did not consider the tape recording in determining whether to grant probation. (Cl. Tr. pp. 13-14.) Appellee accordingly submits that the ex parte proceedings whereby the court listened to the recording did not in any way prejudice appellant.

Certainly, the right to a fair trial includes, as appellant contends, the right to an impartial judgment. Sheppard v. Maxwell, (S.D. Ohio, E.D. 1964) 231 Fed. Supp. 37, 66. The Sheppard case, however, on which appellant relies turned on the fact that the judge, prior to the trial, had said, among other things, "Sam Sheppard is as guilty as he [the judge] was innocent," and, "Well, he [Sheppard] is as guilty as hell." And by making these statements, the judge committed himself to Sheppard's guilt. The trial court in the present case made no statement indicating that he had prejudged the matter, and had no commitment to a particular position on the case.

CONCLUSION

For the reasons stated, appellee respectfully submits that the order denying the petition for writ of habeas corpus be approved.

Respectfully submitted,

THOMAS C. LYNCH, Attorney General

WILLIAM E. JAMES,
Assistant Attorney General

STANTON J. PRICE,
Deputy Attorney General

Attorneys for Appellee

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Stanton J. Pryce
STANTON J. PRYCE
Deputy Attorney General

CR LA
67-926
SJP:kv
4-25-68

APPENDIX I



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THE UNITED STATES OF AMERICA

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FEDERAL BUREAU OF INVESTIGATION
U.S. DEPARTMENT OF JUSTICE
RE: JAMES EARL RAY, AKA
MURDER OF MARTIN LUTHER KING, JR.
BIRMINGHAM, ALABAMA, APRIL 4, 1968

[illegible]

1) The β -function is defined as the derivative of the coupling constant with respect to the logarithm of the renormalization scale μ :

$$\beta(g) = \mu \frac{dg}{d\mu}$$
 where g is the coupling constant.

2) The β -function is a function of the coupling constant g and the dimensionality of the theory d .

$$\beta(g) = -\frac{d}{d\ln\mu} \ln g$$
 where d is the dimensionality of the theory.

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 where d is the dimensionality of the theory.

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5) The β -function is a function of the coupling constant g and the dimensionality of the theory d .

$$\beta(g) = -\frac{d}{d\ln\mu} \ln g$$
 where d is the dimensionality of the theory.

The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation $f(x) = \sum_{n=0}^{\infty} \frac{f_n(x)}{n!}$, where $f_n(x)$ is a function of the n -th order of the differential equation $y^{(n)} = P_n(x)y$. It is shown that the function $f(x)$ is a solution of the differential equation $y^{(n)} = P_n(x)y$ and that it is the only solution of this equation which is analytic at the point x_0 .

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The Government of the United States of America
Department of the Interior
Bureau of Land Management
Washington, D.C. 20250
1950

John A. ...
Special Agent in Charge

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, JOHN GARVEY, being first duly sworn, depose and say:

I am a citizen of the United States, over eighteen years of age and not a party to the within cause; my business address is 600 State Building, Los Angeles, California 90012; I served a copy of the attached APPELLEE'S BRIEF on the following by placing same in an envelope addressed as follows:

NERI RAMOS, ESQ.
234 Van Ness Avenue
San Francisco, California 94105

Said envelope was then, on April 26, 1968, sealed and deposited in the United States mail at Los Angeles, California, the county in which I am employed, with the postage thereon fully prepaid.

Executed on April 26, 1968, at Los Angeles, California.

/s/ JOHN GARVEY

JOHN GARVEY

Subscribed and sworn to before me
this 26th day of April, 1968.

/s/ MAUDE HONEYWILL

MAUDE HONEYWILL
Notary Public in and for said
County and State

See this for additional papers ✓
No. 22452

In the
United States Court of Appeals
For the Ninth Circuit

Carpenters Local 1273 of the United Brotherhood of Carpenters and Joiners of America, Construction General Laborers Local 85, Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council, Oregon State Council of the United Brotherhood of Carpenters and Joiners of America,

Appellants,

vs.

WILLIS A. HILL, doing business as WILLIS A. HILL,
General Contractor,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE ROBERT C. BELLONI, *Judge*

McCOLLOCH, DEZENDORF & SPEARS

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JOHN C. WRIGHT, JR.

8th Floor, Pacific Building

Portland, Oregon 97204

Attorneys for Appellee

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SUBJECT INDEX

| | PAGE |
|---|------|
| JURISDICTION | 1 |
| SUPPLEMENTAL STATEMENT OF THE CASE..... | 1 |
| STATUTES INVOLVED | 4 |
| SUMMARY OF ARGUMENT..... | 4 |
| ARGUMENT | 4 |
| 1. The record supports the trial judge's finding that ap- pellants' conduct violated Section 8(b) (4) (i) (ii) (A) of the Act | 4 |
| 2. The evidence supports the trial court's assessment of damages sustained by plaintiff | 8 |
| 3. The trial court's findings of fact and conclusions of law meet the requirements of Rule 52(a)..... | 10 |
| CONCLUSION | 18 |
| APPENDIX "A" | 19 |
| CERTIFICATE | 20 |

AUTHORITIES

TABLE OF CASES

| | PAGE |
|---|--------|
| American Ship Building Company v. NLRB, 380 US 300, 311-313, 85 S Ct 955, 13 Led 2d 855 (1965) | 7 |
| Bay Counties District Council of Carpenters, AFL-CIO, et al, and Jones and Jones, Inc. et al, 154 NLRB No. 120, 60 LRRM 1190 (1965) | 6 |
| Carr v. Yokohama Specie Bank, Limited, 200 F2d 251, 255 (9th Cir 1952) | 14 |
| Cement Masons Local Union No. 97, AFL-CIO (Interstate Employers Inc., et al), 149 NLRB 1127, 57 LRRM 1471, 1473, (1964) | 5 |
| Chalender v. United States, 119 F Supp 186 (Ct Cl 1954) | 9 |
| Commissioner of Internal Revenue v. Duberstein, 363 US 278, 80 S Ct 1190, 4 Led 2d 1218 (1960) | 17 |
| Deal v. Cincinnati Board of Education, 369 F2d 55 (6th Cir 1966) | 15 |
| Drivers, Local 695 v. NLRB, 361 F2d 547, 62 LRRM 2135 (DC Cir 1966) | 5 |
| Drivers, Salesmen (etc.) Local Union No. 695 (etc.) (Madison Employers' Council), 152 NLRB No. 55, 59 LRRM 1131 (1965) | 5 |
| Dwyer v. Socony-Vacuum Oil Co., 276 F2d 653 (2d Cir 1960).. | 16 |
| Eastman Kodak Co. v. Southern Photo Materials Co., 273 US 359 at 379, 47 S Ct 400, 71 L Ed 684 (1926) | 9 |
| Essex County District Council of Carpenters v. NLRB, 332 F2d 636, 640 (3rd Cir 1964) | 7 |
| George v. United States, 295 F2d 310 (7th Cir 1961) | 18 |
| George A. Fuller Co. v. United States, 63 F Supp 765 (Ct Cl 1946) | 9 |
| Hatahley v. United States, 351 US 173, 76 S Ct 745, 100 L Ed 1065 (1956) | 15, 16 |
| Houston Ready-Cut Houses Co. v. United States, 96 F Supp 629 (Ct Cl 1951) | 9 |
| Kelley v. Everglades Drainage District, 319 US 415 (1943 per curiam) | 15, 16 |
| Lane-Coos-Curry-Douglas Building Trades Council (Willamette General Contractors Ass'n), 155 NLRB 1115, 60 LRRM 1453 (1965) | 1, 3 |

TABLE OF CASES—(Cont'd)

| | PAGE |
|---|------------|
| Local 300, Hod Carriers' and Construction Laborers' Union, etc. and Jones & Jones, Inc., 154 NLRB No. 142, 60 LRRM 1194 (1965) | 6 |
| Local 357, Teamsters v. NLRB, 365 US 667, 81 S Ct 835, 6 Led 2d 11 (1961) | 7 |
| Los Angeles Building & Construction Trades Council (Portofino Marina) 150 NLRB No. 152, 58 LRRM 1315, 1317 (1965) | 5 |
| Los Angeles Building & Construction Trades Council, et al and Quality Builders, Inc., 153 NLRB No. 38, 59 LRRM 1364 (1965) | 6 |
| Los Angeles Building and Construction Trades Council (Couch Electric Company, Inc. et al), 151 NLRB No. 46, 58 LRRM 1440 (1965) | 5 |
| Los Angeles Building and Construction Trades Council et al (Elmer E. Willhoite), 154 NLRB No. 55, 60 LRRM 1053 (1965) | 6 |
| Meat and Highway Drivers Union Local 710 v. NLRB (Wilson & Co.), 335 F2d 709, 716 (DC Cir 1964) | 8 |
| NLRB v. Carpenters, AFL-CIO, 382 F2d 593 (9th Cir 1967).... | 5, 7 |
| NLRB v. International Bro. of Teamsters, Local 294, 342 F2d 18 at 21 (2d Cir 1965) | 7 |
| NLRB v. Lane-Coos-Curry-Douglas BTC, No. 20,783, 9th Cir. August 9, 1967 (per curiam) | 1, 3, 5, 7 |
| NLRB v. Mountain Pacific Chapter of Assoc. Gen. Con., 270 F2d 425 (9th Cir 1959) | 7, 8 |
| NLRB v. Teamsters Local 294, 342 F2d 18, 58 LRRM 2518 (2d Cir 1965) | 5 |
| National Lead Co. v. Wesetrn Lead Products Co., 291 F2d 447 (9th Cir 1961) | 17 |
| Needles for Use and Benefit of Needles v. United States, 101 Ct Cl 535, 618 (1944) | 9 |
| Petterson Lighterage & Towing Corp. v. New York Central R. Co., 126 F2d 992, 996 (2d Cir 1942) | 14 |
| Sachs v. United States, 63 F Supp 59, 71 (Ct Cl 1945) | 9 |
| Smith v. Dental Products Co., 168 F2d 516 (7th Cir 1948).... | 16, 17 |
| Stone v. Farnell, 239 F2d 750, 758 (9th Cir 1956) | 14 |
| Summerbell v. Elgin Nat. Watch Co., 215 F2d 323, 324 (DC Cir 1954) | 17 |

TABLE OF CASES—(Cont'd)

| | PAGE |
|--|---------|
| Teamsters, Chauffeurs, (etc.) Local No. 386 (etc.) and California Association of Employers, 152 NLRB No. 83, 59 LRRM 1223 (1965) | 6 |
| Teamsters Local 413 v. NLRB, 334 F2d 539 (DC Cir 1964); cert den 85 S Ct 264 (1964) | 5, 7, 8 |
| Thomas P. Graham, Jr. v. Lane-Coos-Douglas Counties Building & Construction Trades Council (D Or 1965, Civil No. 65-129) | 2 |
| Trentman v. City and County of Denver, 236 F2d 951, 953 (10th Cir 1956) | 14 |
| United States v. Pendergrast, 241 F2d 687, 689 (4th Cir 1957) (per curiam) | 17, 18 |
| Woods Construction Co. v. Pool Construction Co., 314 F2d 405 (10th Cir 1963) | 17 |

OTHER AUTHORITIES

| | |
|--|-----------------------|
| 2(B) Barron & Holtzoff § 1127 (Wright Ed. 1961) | 14 |
| 5 Moore's Federal Practice (2d ed) ¶ 52.01, p 2606 | 13 |
| 5 Moore's Federal Practice (2d ed) ¶ 52.05[1], p 2644, fn 9 | 17 |
| 6 Moore's Federal Practice (2d ed) ¶ 52.05-06 | 14 |
| Rule 52(a), Fed. R. Civ. P. | 4, 10, 13, 15 |
| Rule 81(a)(1), Fed. R. Civ. P. | 16 |
| § 8(a)(3), LMRA | 7 |
| § 8(b)(4)(A), LMRA | 1, 2 |
| § 8(b)(4)(i)(ii)(A), LMRA | 3, 4, 5, 7, 13 |
| § 8(e), LMRA | 2, 5, 6, 7, 8, 12, 14 |

APPELLEE'S BRIEF

JURISDICTION

Appellee accepts appellants' statement of jurisdiction.

SUPPLEMENTAL STATEMENT OF THE CASE

Appellants' statement of the case is incomplete, and a supplemental statement is required:

This is an action for damages under § 303 of the Labor Management Relations Act (29 USC section 187) sustained as a result of conduct previously held by the National Labor Relations Board and this Court to constitute an unfair labor practice in violation of section 8(b)(4)(i)(ii)(A) of the Act. *Lane-Coos-Curry-Douglas Building Trades Council (Willamette General Contractors Ass'n)*, 155 NLRB 1115, 60 LRRM 1453 (1965), enf'd sub nom *NLRB v. Lane-Coos-Curry-Douglas BTC*, No. 20,783, 9th Cir., August 9, 1967 (per curiam).

Section 303 of LMRA provides that anyone injured by "conduct defined as an unfair labor practice in section 8(b)(4) * * * shall recover the damages by him sustained * * *" (Section 303 is set out in full in Appendix A, infra 19). Subsection (A) of section 8(b)(4) makes it an unfair labor practice to engage in picketing or other coercion or to induce a strike with an object of forcing an employer to enter into an agree-

ment prohibited by section 8(e) of the Act. (Material parts of these sections are quoted in Appendix A to appellants' opening brief.)

Appellants picketed¹ plaintiff's construction site commencing January 18, 1965, until enjoined by the federal district court on April 9, 1965.² The admitted purpose of the picketing was to force plaintiff to execute an agreement known as "Oregon State Building and Construction Trades Council Articles of Agreement" (Jt Ex 1, Tr 16, 28, 159-60, 171, 193). The agreement included the following clause:

"It is further agreed that no employee working under this Agreement need * * * cross any picket line or enter any premises at which there is a picket line authorized by the Council; or any other Building & Construction Trades Council or authorized by any Central Labor Council, or handle, transport or work upon or with any products declared unfair by any of such Councils." (Jt Ex 1)

Throughout this entire period, plaintiff was a "union contractor," i.e. he hired only union employees and was a party to the area labor agreements of the defendant Carpenters and the defendant Laborers (the only two trades he employs) (Tr 21-23). All of plaintiff's

1. In addition to the picketing, defendants refused to refer job applicants as required under the existing Carpenters and Laborers agreements (*e.g.* Tr 202-203).

2. The injunction was issued pursuant to proceedings brought by the Regional Director of the NLRB under section 10(1) of LMRA (29 USC section 160(1)). *Thomas P. Graham, Jr. v. Lane-Coos-Curry-Douglas Counties Building & Construction Trades Council*, (D Or 1965, Civil No. 65-129).

subcontractors on the picketed job were also “union contractors”, and were known by defendants to be “union contractors” (Tr. 30, 158). Thus, the statements on the picket signs (P’s Ex 6) that working conditions were inferior to union conditions were untrue (Tr 199).

An unfair labor practice charge was filed against the defendant Council and was tried before a Trial Examiner of the Board, who found that the picketing violated section 8(b)(4)(i)(ii)(A) of the Act. On review, the Board agreed. *Lane-Coos-Curry-Douglas Building Trades Council (Willamette General Contractors Ass’n)*, 155 NLRB 1115, 60 LRRM 1453 (1965). When the Council refused to comply with the Board’s order, the Board petitioned this Court for enforcement. The case was briefed and argued. This Court affirmed and enforced the Board’s decision. *NLRB v. Lane-Coos-Curry-Douglas BTC*, No. 20,783, 9th Cir., August 9, 1967 (per curiam).

The picketing shut down plaintiff’s job for 2.7 months and caused a total composite job delay of approximately five months (Tr 26, 32, 37-38). This action seeks recovery of damages resulting from such delay. After hearing testimony and studying 13 exhibits, the trial court, sitting without a jury, found the four appellants jointly liable and assessed damages in the amount of \$11,500.

STATUTES INVOLVED

In addition to the statutes cited by appellants, Section 303 of the Labor Management Relations Act (29 USC § 187) is involved. It is set out in full in Appendix A, *infra* 19).

SUMMARY OF ARGUMENT

The record supports the trial court's conclusion that appellants violated Section 8(b) (4) (i) (ii) (A) of LMRA and the judgment for \$11,500 damages. The trial court's findings are sufficient for review of the judgment by this Court and comply with Rule 52(a) of the Federal Rules of Civil Procedure.

Argument

- 1. The record supports the trial judge's finding that appellants' conduct violated Section 8(b)(4)(i)(ii)(A) of the Act.**

Appellants picketed plaintiff for the admitted (Tr 16) purpose of obtaining plaintiff's signature on Joint Exhibit 1. This agreement contains clauses allowing an employee to refuse to cross "any picket line" and to refuse to handle, transport or work upon "any products declared unfair * * *." These clauses, and picketing to obtain them, were held to violate Section 8(b) (4) (i)-(ii) (A) of the Act by the Board and by this Court, which

enforced the Board's order, *NLRB v. Lane-Coos-Curry-Douglas BTC*, supra. Substantially identical clauses, and coercion to obtain them, have been held illegal in a long series of decisions which establish that such picket line clauses and clauses authorizing the refusal to handle "unfair" goods violate Section 8(e), that they are not within the construction industry proviso to 8(e), and that picketing to secure them violates 8(b)(4)(i) and (ii)(A):

Court decisions:

NLRB v. Carpenters, AFL-CIO, 382 F2d 593, (9th Cir 1967)

Drivers Local 695 v. NLRB, 361 F2d 547, 62 LRRM 2135 (DC Cir 1966)

NLRB v. Teamsters Local 294, 342 F2d 18, 58 LRRM 2518 (2d Cir 1965)

Teamsters Local 413 v. NLRB, 334 F2d 539 (DC Cir 1964); *cert den* 85 S Ct 264 (1964)

Decisions of the Board:

Cement Masons Local Union No. 97, AFL-CIO (Interstate Employers, Inc., et al), (1964) 149 NLRB 1127, 57 LRRM 1471, 1473

Los Angeles Building & Construction Trades Council (Portofino Marina), (1965) 150 NLRB No. 152, 58 LRRM 1315, 1317

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Drivers, Salesmen (etc.) Local Union No. 695 (etc.) (Madison Employers' Council), (1965) 152 NLRB No. 55, 59 LRRM 1131

Teamsters, Chauffeurs, (etc.) Local No. 386 (etc.) and California Association of Employers, (1965) 152 NLRB No. 83, 59 LRRM 1223

Los Angeles Building & Construction Trades Council, et al and Quality Builders, Inc., (1965) 153 NLRB No. 38, 59 LRRM 1364

Los Angeles Building and Construction Trades Council et al (Elmer E. Willhoite), (1965) 154 NLRB No. 55, 60 LRRM 1053

Bay Counties District Council of Carpenters, AFL-CIO, et al, and Jones and Jones, Inc. et al, (1965) 154 NLRB No. 120, 60 LRRM 1190

Local 300, Hod Carriers' and Construction Laborers' Union, etc. and Jones & Jones, Inc., (1965) 154 NLRB No. 142, 60 LRRM 1194

Appellants' present contentions were considered and rejected by this Court when it enforced the Board's order. They were reviewed in two briefs filed by the Board and one filed by plaintiff's association, and it is believed to be unnecessary to repeat those comments in detail here. The Board's reply brief, in particular, examined with great clarity appellants' contention that the construction industry proviso to section 8(e) is applicable; the proviso applies only to "the contracting or subcontracting of work" and not to a refusal to handle (even at jobsites) "any products declared unfair" — which

would include products produced off the jobsite.³ Furthermore, the picket line clause involved in this case would allow recognition of “any” secondary picket line and has nothing to do with the “contracting or subcontracting of work”.⁴ The construction industry proviso does not permit jobsite employees to boycott off-site employers by “unfair goods” clauses or to support secondary picket lines.

Appellants again contend that their picketing is lawful under *NLRB v. Mountain Pacific Chapter of Assoc. Gen. Con.*, 270 F2d 425 (9th Cir 1959); however, as the Board’s brief pointed out, cases such as *Mountain Pacific* are inapplicable because they deal with section 8(a)(3) in which *actual motivation* is generally the inquiry,⁵ whereas under section 8(e) the union’s motive is irrele-

3. “ ‘Hot cargo’ agreements in any form are prohibited by section 8(e). * * *

“Nor is the union insulated from the effect of section 8(b)(4)(ii)(A) by the ‘construction industry’ proviso to section 8(e). * * * the proviso * * * does not sanction a ‘boycott against suppliers who do not work on the job site.’ * * *.” *NLRB v. International Bro. of Teamsters, Local 294*, 342 F2d 18 at 21 (2d Cir 1965). See also *Essex County District Council of Carpenters v. NLRB*, 332 F2d 636, 640 (3rd Cir 1964). The legislative history showing the inapplicability of the 8(e) proviso was reviewed in the Board’s brief to this Court, p 4.

4. “* * * To the extent that the clause would protect such refusal to cross [a secondary picket line], it would then be authorizing a secondary strike, and would *pro tanto* be void under § 8(e) of the Act * * *.” *Truck Drivers Local No. 413 v. NLRB*, 334 F2d 539 at 543 (DC Cir 1964) (Emphasis in original)

Appellants’ broad claim (Apps Br 15) — that plaintiff’s position that a clause permitting refusal to cross “any” picket line violates 8(e) is “utterly without support” — is astonishing since this Court has at least twice held such a clause to violate 8(e). *NLRB v. Carpenters, AFL-CIO*, 382 F2d 593 (9th Cir 1967 per curiam), *National Labor Relations Board v. Lane-Coos-Curry-Douglas Counties Building & Construction Trades Council*, supra.

5. See *Local 357, Teamsters v. NLRB*, 365 US 667, 81 S Ct 835, 6 L ed 2d 11 (1961); *American Ship Building Company v. NLRB*, 380 US 300, 311-313, 85 S Ct 955, 13 L ed 2d 855 (1965).

vant: "the contract must be tested by its terms." *Truck Drivers Local 413 v. NLRB*, 334 F2d at 542 (DC Cir 1964); *Meat and Highway Drivers Union Local 710 v. NLRB (Wilson & Co.)*, 335 F2d 709, 716 (DC Cir 1964). Appellants do not deny that the *terms* of the agreement now in question cover secondary as well as primary conduct. Consequently, we are not concerned with presumptions about motivation (as the Board was in *Mountain Pacific*); the contract covers illegal conduct on its face and thereby violates section 8(e).

2. The evidence supports the trial court's assessment of damages sustained by plaintiff.

Appellants' picketing delayed plaintiff's job approximately five months and caused plaintiff damages of the kind usually associated with such construction delay: Wasted general overhead, wasted jobsite overhead, lost income and miscellaneous specific costs attributable to the delay. Throughout the proceedings, plaintiff has recognized the difficulty, if not the impossibility, of measuring his damages with mathematical certainty. However, it is well settled that the trier of the facts is not for that reason prevented from determining the amount of damages sustained.

*** * * * * Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate.' This, we think, was a correct statement

of the applicable rules of law. Furthermore, a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. [citations omitted]” (*Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 US 359 at 379, 47 S Ct 400, 71 L Ed 684 (1926))

This principle has often been applied in delay damage cases, *e.g.*, *Needles for Use and Benefit of Needles v. United States*, 101 Ct Cl 535, 618 (1944); *George A. Fuller Co. v. United States*, 63 F Supp 765 (Ct Cl 1946); *Houston Ready-Cut Houses Co. v. United States*, 96 F Supp 629 (Ct Cl 1951); *Chalender v. United States*, 119 F Supp 186 (Ct Cl 1954).

The evidence shows in detail the usual elements of plaintiff’s delay damages: (1) General overhead was wasted in the amount of approximately \$10,000 or 5.14% of the approximately \$200,000 gross income lost because of appellants’ picketing, (P’s Exs 13, 14, 16, Tr 55-67, 217-21). See, *e.g.*, *Sachs v. United States*, 63 F Supp 59, 71 (Ct Cl 1945). (2) Wasted job overhead and pay increases totaled about \$2,700 (P’s Ex 15, Tr 68-76, 244). (3) Lost profits amounted to approximately \$4,200, based on plaintiff’s three-year profit rate of 2.18% (P’s Ex 13, Tr 76-77, 221-25, 244). (4) The specific engineering cost of preparing a “critical path analy-

sis” in the amount of \$1,050 was also wasted (P’s Ex 18, Tr 77-78, 180-82). The issue of damages was briefed in detail to the trial court, and those briefs are in the record on appeal for this Court’s review.

Appellants complain that the trial court “rounded off” plaintiff’s claim and *reduced* it to \$11,500 (App Br 17); however, this merely concedes that the evidence supported a substantially greater award. They complain that an accrual accounting method should have been used (App Br 17-18); however, the evidence shows that the amount of plaintiff’s damages are nearly identical whether the cash basis or accrual basis is employed (Tr 224, 235, 244, P’s Exs 21, 13). Appellants decline to argue any theory of damages to this Court (or, more accurately, their theory, argued in the trial court, that a five-month construction delay causes no damage at all), but simply refer to their trial court brief on damages (App Br 18); plaintiff’s trial court reply brief on damages fully answers their contentions (p 79 of Clerk’s Supplemental Record on Appeal). A review of these briefs displays the careful consideration given the question of damages by the trial court and the evidence supporting the court’s award.

3. The trial court’s findings of fact and conclusions of law meet the requirements of Rule 52(a).

The pertinent portion of Rule 52(a) states:

“(a) Effect. In all actions tried upon the facts without a jury * * * the court shall find the facts specially and state separately its conclusions of law thereon * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *.”

The trial court entered the following findings and conclusions:

“FINDINGS OF FACT.

“I.

“Plaintiff is a sole proprietorship engaged as a general contractor in the construction industry and affects interstate commerce. Defendants are and at all times herein mentioned have been labor organizations representing employees in an industry affecting commerce and maintaining their principal offices in the State of Oregon within the District of this Court.

“II.

“Commencing on January 18, 1965, defendants Carpenters Local 1273 of the United Brotherhood of Carpenters and Joiners of America, Construction General Laborers Local 85, Lane-Coos-Curry-Douglas Counties Building & Construction Trades Council, and Oregon State Council of the United Brotherhood of Carpenters and Joiners of America, picketed plaintiff's construction site in Eugene, Oregon, where he was building a book store for the University of Oregon Student Co-op Association, and induced and encouraged a strike of employees working on that job site. An object of such picketing was to require plaintiff to execute a contract designated ‘Oregon State Building and Construction Trades Council Articles of Agreement,’ which includes the following provision:

'It is further agreed that no employee working under this Agreement need * * * cross any picket line or enter any premises at which there is a picket line authorized by the Council; or any other Building & Construction Trades Council or authorized by any Central Labor Council or handle, transport or work upon or with any product declared unfair by any of such Councils.'

Such picketing continued until April 9, 1965, when enjoined by this Court upon proceedings brought by the National Labor Relations Board.

"III.

"Plaintiff has presented no evidence that defendant Oregon State Council of Laborers has been in any way involved in the allegations charged.

"IV.

"As a direct and proximate result of the actions of defendants as above described, plaintiff has been damaged in the amount of \$11,500.00.

"CONCLUSIONS OF LAW

"I.

"This Court has jurisdiction of this action by virtue of § 303 of the Labor-Management Relations Act (29 U.S.C. § 187(b)).

"II.

"This case is dismissed as against defendant Oregon State Council of Laborers.

"III.

"The Agreement designated 'Oregon State Building and Construction Trades Council Article of Agreement' violates § 8(e) of the Labor-Management Relations Act (29 U.S.C. § 158(e)), and there-

fore defendants' picketing, which had as an object forcing plaintiff to enter into said Agreement, violated § 8(b)(4)(i)(ii)(A) of the Labor-Management Relations Act.

“IV.

“Plaintiff shall have judgment for damages against defendants Carpenters Local 1273 of the United Brotherhood of Carpenters and Joiners of America, Construction General Laborers Local 85, Lane - Coos - Curry - Douglas Counties Building and Construction Trades Council, and Oregon State Council of the United Brotherhood of Carpenters and Joiners of America, in the amount of \$11,-500.00.”

The rule does not comment on the degree of particularity required in findings. Appellants contend that the findings must include “subsidiary findings as to the evidence produced and detailed facts existing in the record” (App Br 7). Neither the rule nor the authorities cited by appellants so require. In the words of the Committee which drafted Rule 52(a):

“* * * the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts. * * *” Committee Note of 1946 to subdivision (a), quoted in 5 Moore’s Federal Practice (2d ed) § 52.01 at p 2606.

As stated by Judge Learned Hand:

“* * * Findings should not be discursive; they should not state the evidence or any of the reason-

ing upon the evidence; they should be categorical and confined to those propositions of fact which fit upon the relevant propositions of law. * * *” *Peterson Lighterage & Towing Corp. v. New York Central R. Co.*, 126 F2d 992, 996 (2d Cir 1942); see also *Trentman v. City and County of Denver*, 236 F2d 951, 953 (10th Cir 1956).

This Court has stated the rule as follows:

“* * * [T]he federal rule relating to findings of a trial court does not require the court to make findings on all facts presented or to make detailed evidentiary findings; if the findings are sufficient to support the ultimate conclusion of the court they are sufficient. * * * The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence. * * *” *Carr v. Yokohama Specie Bank, Limited*, 200 F2d 251, 255 (9th Cir, 1952) see also *Stone v. Farnell*, 239 F2d 750, 758 (9th Cir, 1956).⁶

This case does not involve the resolution of complex or technical issues. *It is a simple case*: Appellants picketed to force plaintiff to sign the agreement; the agreement violates § 8(e); plaintiff was damaged by the picketing. The fact of the picketing and its purpose is admitted; that this agreement violates § 8(e) was previously determined by this Court; the damages are typical of those incurred in a delay damage claim. Only

6. See 2(B) Barron & Holtzoff, § 1127 (Wright Ed. 1961); 6 Moore's Federal Practice ¶ 52.05 06 (2d ed).

one employer and only one jobsite were involved. Although detailed findings are appropriate in a complex case with numerous issues,⁷ this is not such a case.

Appellants contend that the trial court's findings on damages are inadequate, because “* * * where total damages awarded in a given case are made up of several distinct elements the trial court must give a breakdown of the various items it has included in its total award in order to comply with Rule 52(a) * * *” (App Br 11); however, not one of the three cases principally relied on support such a rule. Appellants cite *Hatahley v. United States*, 351 US 173, 76 S Ct 745, 100 L Ed 1065 (1956), which was an action under the Federal Tort Claims Act brought by 30 Navajo Indians claiming that federal agents had wrongfully rounded up and destroyed their horses and burros. The trial judge awarded the 30 plaintiffs jointly \$100,000 damages. The Supreme Court said:

“* * * But it is necessary in any case that the findings of damages be made with sufficient particularity so that they may be reviewed. Here the District Court merely awarded the amount prayed for in the complaint. There was no attempt to allot any particular sum to any of the 30 plaintiffs, who owned varying numbers of horses and burros. *There can be no apportionment of the award among the petitioners unless it be assumed that the horses were*

7. *Kelley v. Everglades Drainage District*, 319 US 415 (1943, per curiam) (bankruptcy — municipal debt readjustment plan), and *Deal v. Cincinnati Board of Education*, 369 F2d 55 (6th Cir, 1966) (civil rights — de facto segregation — intent or neglect of school board), cited by appellants, are examples.

valued equally, the burros equally, and some assumption is made as to the consequential damages and pain and suffering of each petitioner. These assumptions cannot be made in the absence of pertinent findings, and the findings here are totally inadequate for review. The case must be remanded to the District Court for the appropriate findings in this regard.” 351 US at 182, emphasis added.

The defects in the *Hatahley* findings are not present here—damages here need not be allocated among a large number of plaintiffs. Appellants cite *Dwyer v. Socony-Vacuum Oil Co.*, 276 F2d 653 (2d Cir 1960) (per curiam), which was an admiralty action for personal injury;⁸ there, a lump sum award of \$5,000 to the plaintiff was held sufficient on appeal. Finally, appellants cite *Smith v. Dental Products Co.*, 168 F2d 516 (7th Cir 1948), which is readily distinguishable. There, a master had been appointed to hear evidence on damages. After listening to testimony, he said that he would study the record and might wish more evidence of the amount of damages. Before making any findings or report, the master died. The trial court heard no additional evidence and made no *findings* at all on damages—it simply entered a judgment for \$60,000 as lost profits and damages. The decision on appeal was based on the involvement of the master, the fact that the court

8. The Federal Rules of Civil Procedure do not apply to proceedings in admiralty (Rule 81(a)(1)).

heard no evidence (and could not judge demeanor and credibility), and the failure to enter any findings at all—all factors not present in this case.

Individual review of other cases cited by appellants is believed to be of little value. “[T]he degree of particularity must necessarily be gauged to the case at hand * * * ” (5 Moore’s Federal Practice (2d ed) ¶ 52.05 [1], p 2644, fn 9). Thus, appellants’ cases involving an absence of any findings,⁹ or a general conclusionary finding on a legal issue,¹⁰ or which omit a crucial finding necessary for liability,¹¹ are not applicable here.

It is not uncommon to have findings of damages in a lump sum amount, particularly when relatively small amounts are involved, and such findings are adequate on appeal *United States v. Pendergrast*, 241 F2d 687, 689 (4th Cir 1957) (per curiam); *Summerbell v. Elgin Nat. Watch Co.*, 215 F2d 323, 324 (DC Cir 1954).

Neither appellants nor this Court have been handicapped by the conciseness of the trial court’s findings, which form an adequate basis for review in this simple case. Appellants do not contend that the trial court con-

9. E.g., *Smith v. Dental Products Co.*, supra.

10. E.g., *Commissioner of Internal Revenue v. Duberstein*, 363 US 278, 80 S Ct 1190, 4 Led 2d 1218 (1960) (where the trial court merely concluded that the transfer was a “gift” — a legal characterization which requires a factual basis); see, e.g., *National Lead Co. v. Western Lead Products Co.*, 291 F2d 447 (9th Cir 1961) (conclusory findings on the state of prior art or the lack of invention).

11. E.g., *Woods Construction Co. v. Pool Construction Co.*, 314 F2d 405 (10th Cir 1963).

sidered improper elements of damages, nor has lack of specificity in the findings in any way prevented appellants from determining whether the case presents a question worthy of appeal. See *United States v. Pendergrast*, *supra*; cf *George v. United States*, 295 F2d 310 (7th Cir 1961). A determination of whether the trial court's findings on either liability or damages was "clearly erroneous" can readily be made from the record. Thus, no useful purpose would be accomplished in this case by requiring more detailed findings.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be affirmed.

Respectfully submitted,

McColloch, Dezendorf & Spears

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Attorneys for Appellee

APPENDIX "A"**Additional Statute Involved**

"*Sec. 303(a)* It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act as amended.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

CERTIFICATE

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney

United States
COURT OF APPEALS
for the Ninth Circuit

Carpenters Local 1273 of the United Brotherhood
of Carpenters and Joiners of America, Construction
General Laborers Local 85, Lane-Coos-Curry-Douglas
Counties Building and Construction Trades Council,
Oregon State Council of the United Brotherhood
of Carpenters and Joiners of America,

Appellants,

v.

Willis A. Hill, doing business as
Willis A. Hill, General Contractor,

Appellee.

APPELLANTS' REPLY BRIEF

*On Appeal from the United States District Court
for the District of Oregon*

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FILED

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INDEX

| | Page |
|--|------|
| Reply to Appellee's Supplemental Statement of the Case | 1 |
| Argument | 2 |
| The trial court's findings of fact and conclusions of law failed to meet the requirements of Rule 52(c) | 2 |
| There is no basis in the record for the trial court's finding and conclusion that appellants' picketing was unlawful | 7 |
| The record and evidence fail to support the trial court's award of damages | 10 |
| Conclusion | 12 |
| Certificate of Counsel | 13 |

AUTHORITIES

Page

CASES

| | |
|---|-------|
| Alexander v. Nash-Kelvinator, 261 F.2d 187 (2d Cir. 1958) | 4 |
| American Machine & Metals, Inc. v. DeBothezat Impeller Co., 180 F.2d 342 (2d Cir. 1950) | 7 |
| Carpenters, Local 383 v. NLRB, 323 F.2d 422 (9th Cir. 1963) | 10 |
| Carr v. Yokohama Specie Bank, Limited, 200 F.2d 251, 255 (9th Cir. 1952) | 3 |
| Drivers Local 695 v. NLRB, 361 F.2d 547 (D.C. Cir. 1966) | 9 |
| Hatahley v. United States, 351 U.S. 173, 76 S. Ct. 745 (1956) | 4 |
| Hazeltine Corp. v. Crosley Corp., 130 F.2d 344 (6th Cir. 1942) | 7 |
| Kruger v. Purcell, 300 F.2d 830 (3d Cir. 1962) | 2 |
| Kweskin v. Finklestein, 223 F.2d 677 (7th Cir. 1955) | 2 |
| NLRB v. Carpenters, AFL-CIO, 382 F.2d 593 (9th Cir. 1967) | 9, 10 |
| NLRB v. Lane-Coos-Curry-Douglas B.T.C. No. 20, 783, 9th Cir., August 9, 1967) | 10 |
| NLRB v. Mountain Pacific Chap., AGC, 270 F.2d 425 (9th Cir. 1959) | 8 |
| NLRB v. Teamsters Local 294, 342 F.2d 18 (2d Cir. 1965) | 9 |
| Newport News, Shipbuilding & Drydock Co. v. United States, 226 F.2d 137 (4th Cir. 1955) | 7 |
| Smith v. Dental Products Co., 168 F.2d 516 (7th Cir. 1948) | 3, 4 |

AUTHORITIES (Cont.)

| | Page |
|---|------|
| Summerbell v. Elgin Nat. Watch Co., 215 F.2d 323 (D.C. Cir. 1954) | 5 |
| Teamsters Local 413 v. NLRB, 334 F.2d 539 (D.C. Cir. 1964) | 9 |
| United States v. Horsfall, 270 F.2d 107 (10th Cir. 1959) | 5 |
| United States v. Merz, 306 F.2d 39 (10th Cir. 1962) (dictum) rev'd on other grounds, 376 U.S. 192, 84 S. Ct. 639 (1964) | 7 |
| United States v. Pendergrast, 241 F.2d 687 (4th Cir. 1957) | 5, 6 |
| Woods Construction Co. v. Pool Construction Co., 314 F.2d 405 10th Cir. 1963) | 5 |

STATUTES AND COURT RULES

| | |
|---|-------------|
| Sec. 8 (b) (4) (i) (ii) (A), Labor Management Rela- tions Act, as amended (29 U.S.C. § 158(b) (4) (i) (ii) (A)) | 3, 9, 10 |
| Sec 8(e), Labor-Management Relations Act, as amended (29 U.S.C. § 158(e)) | 3, 8, 10 |
| Rule 52 (a), Federal Rules of Civil Procedure | 2, 3, 4, 12 |

United States
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Carpenters Local 1273 of the United Brotherhood
of Carpenters and Joiners of America, Construction
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Counties Building and Construction Trades Council,
Oregon State Council of the United Brotherhood
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Appellants,

v.

Willis A. Hill, doing business as
Willis A. Hill, General Contractor,

Appellee.

APPELLANTS' REPLY BRIEF

*On Appeal from the United States District Court
for the District of Oregon*

**REPLY TO APPELLEE'S SUPPLEMENTAL
STATEMENT OF THE CASE**

Appellants accept appellee's supplemental statement of the case with the following exception: Appellee states (Ans. Br. 3)¹ that appellant, Lane-Coos-

¹ Op. Br. refers to Appellants' Opening Brief.

Ans. Br. refers to Appellee's Answering Brief.

Cr. refers to Clerk's Record.

Cr. S. refers to Clerk's Supplemental Record.

Tr. refers to Reporter's Transcript.

Curry-Douglas Counties Building and Construction Trades Council's picket signs were untrue in stating that working conditions were inferior to those enjoyed by union members. To the extent that union member employees of employers other than the appellee herein enjoyed the benefits of the Articles of Agreement (Jt. Ex. 1) relating to the contracting and subcontracting of work at construction sites, working conditions were in fact inferior to those enjoyed by other union members.

ARGUMENT

I

The Trial Court's Findings of Fact and Conclusions of Law Failed to Meet the Requirements of Rule 52(a).

Appellee's answering brief in no way weakens or controverts the established principle that in order to comply with Rule 52(a) trial courts must make those pertinent, subsidiary findings of fact which provide the basis for ultimate conclusions and decisions they reach. *Kruger v. Purcell*, 300 F.2d 830 (3d Cir. 1962), *Kweskin v. Finklestein*, 223 F.2d 677 (7th Cir. 1955). The trial court in the instant case failed to make any subsidiary findings, much less findings of some pertinence or relevance. (See Op. Br. 8-9 for full discussion.)

Appellants find no disagreement with this Court's interpretation of Rule 52(a) cited by appellee (Ans. Br. 14) where it stated:

"The ultimate test as to the adequacy of findings will always be whether they are sufficiently

comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence" *Carr v. Yokahama Specie Bank, Limited*, 200 F.2d 251, 255 (9th Cir. 1952)

The question before the Court here is not so much as to the adequacy of subsidiary findings actually made, but more as to the fact that no such findings were made. The trial judge's findings that the Articles of Agreement (St. Ex. 1) violated Sec. 8(e) and that appellants' picketing violated Sec. 8(b) (4) (i) (ii) (A) were general and conclusory, unsupported by any subsidiary findings. Secondly, he failed to provide any findings establishing basis or support for his lump sum award of damages.

Contrary to appellee's assertion (Ans. Br. 16-17), the trial court here did precisely what the court prohibited and determined to be violative of Rule 52 (a) in *Smith v. Dental Products Co.*, 168 F.2d 516 (7th Cir. 1948). In *Smith*, the trial court entered a lump sum judgment for \$60,000 as lost profits and damages without subsidiary findings of fact or conclusions of law. On appeal, the Seventh Circuit Court ruled that the requirements of Rule 52(a) were mandatory and obligated the trial court to make such subsidiary findings of fact as would provide a basis for its ultimate conclusion as to damages. Whatever may have been the reason in *Smith* for the court's failure to make any subsidiary findings, the significant fact on which the decision turned was that none

were made. As in the instant case, the lack of sufficient findings to establish a basis in *Smith* for the total damage award violated the binding requirements of Rule 52(a).

Alexander v. Nash-Kelvinator, 251 F.2d 187 (2d Cir. 1958) is on all fours with the present case. There the trial court, in an action involving personal injury and property damage, awarded judgments to two plaintiffs in the lump sum, blanket amount of \$65,000 and \$45,000. The Court of Appeals ruled this did not meet the requirement of Rule 52(a) because the trial court had failed to show the amount of the items of damage such as hospital bills, medical expenses, loss of consortium, pain and suffering, etc., which went to make up the total award.² The Court held that it must have this breakdown to show the bases or theory used by the trial court to arrive at the total award in order to adequately review the case. In addition, the appellant was held entitled to this breakdown in order to fully exercise his right of appellate review.

Likewise, in the instant case, the lump sum award by the trial court had to have been made up of several diverse elements (see brief on damages, Cr. S. 47-95), none of which were enumerated in the findings of fact and conclusions of law. Appellate courts

² Appellee's attempt to differentiate the decision in *Hataley v. United States*, 351 U.S. 173, 76 S. Ct. 745 (1956) (See Ans. Br. pp. 15-16) creates at best a distinction without a difference. Whether the problem is enumeration of subsidiary facts supporting an award of damages to an individual or allocation between several individuals, the general principle enunciated is equally as important and pertinent.

have neither the power, nor should they be required to search the record or review the evidence to supply the facts necessary to determine the issues of a case. *Woods Construction Co. v. Pool Construction Co.*, 314 F.2d 405 (10th Cir. 1963).³

The cases of *United States v. Pendergrast*, 241 F.2d 687 (4th Cir. 1957) and *Summerbell v. Elgin Nat. Watch Co.*, 215 F.2d 323 (D.C. Cir. 1954) cited in appellee's answering brief, page 17, do not support his case. In *Summerbell*, the trial court had issued the following as part of its findings of fact and conclusions of law:

"Considering what the record shows he did, his education, his experience, his contacts, and the amount of time expended on this class of activity, his past earnings, the amount of the retainer in connection with the other products, and the usefulness of his services, I am of the opinion that their fair and reasonable value is \$5,000." *Summerbell v. Elgin Nat. Watch Co.*, supra at p. 324.

In essence, it had provided the appellant and the appellate court with the subsidiary facts that were the basis for its determination that the fair and rea-

³ Appellee's assertion that the *Woods Construction* case is not applicable is without foundation. While that case certainly involved insufficient findings on a question of liability and not damages, Rule 52(a) applies both to questions of liability and damages. Decisions on both must be supported by sufficient subsidiary findings under Rule 52(a). *United States v. Horsfall*, 270 F.2d 107 (10th Cir. 1959). In any event, appellants are appealing this matter for the trial court's failure to make findings as to liability (supra, p. 3 and Op. Br. 14) as well as for its failure to make sufficient findings as to damages.

sonable value of certain services was \$5,000. In the instant case, the trial court found only that,

“As a direct and proximate result of the actions of defendants as above described, plaintiff has been damaged in the amount of \$11,500.00.” (Cr. pp. 13-14)

No subsidiary facts were enumerated to support this award.

In *United States v. Pendergrast*, 241 F.2d 687 (4th Cir. 1957), the court principally ruled that regardless of any insufficiency in the findings and conclusions of the trial court, the error was waived by the government's failure to request more specific findings at the time motion was made for a new trial on the ground that the damages awarded were excessive. The court there went on to say in what must be considered dictum to the principal decision that more specific findings would not aid the court under the facts of that case in determining the correctness of the trial court's ruling.

That may well have been the case in *Pendergrast*, but here the issues, particularly those relating to alleged damages, were of a highly complex and technical nature. While appellee's counsel may choose to deny the fact now (Ans. Br. 14), his previous actions, as well as those of the appellant's counsel, in calling expert witnesses, placing numerous exhibits relating to the issue of damages into evidence and submitting extensive briefs to the trial court belie any such claim. Where expert witnesses are at variance in

their testimony (see Tr. 216-248, 261-286) and the issues are difficult, it is more imperative than ever that the appellate court have the benefit of comprehensive and pertinent facts on which the trial judge relied for support of his findings and conclusions. *United States v. Merz*, 306 F.2d 39 (10th Cir. 1962) (dictum) rev'd. on other grounds, 376 U.S. 192, 84 S. Ct. 639 (1964); *Hazeltine Corp. v. Crosley Corp.*, 130 F.2d 344 (6th Cir. 1942).

II

There is No Basis in the Record for the Trial Court's Finding and Conclusion That Appellants' Picketing was Unlawful.

Appellee's answering brief makes it clear he completely misunderstands the thrust and direction of appellants' argument. While a fair reading of the Oregon State Building and Construction Trades Council Articles of Agreement (Jt. Ex. 1) in its entirety establishes that it is limited to job site matters, even if it is read in a narrower and more restricted fashion, it is susceptible of a valid and legal construction which should be given to it under prevailing federal case law concerning contract interpretation. (See Op. Br. pp. 13-17 for full discussion of this point) *Newport News, Shipbuilding & Drydock Co. v. United States*, 226 F.2d 137 (4th Cir. 1955); *American Machine & Metals Inc. v. DeBothezat Impeller Co.*, 180 F.2d 342 (2d Cir. 1950). Appellee nowhere disagrees with the validity or appropriateness of this legal prin-

ciple. Furthermore, the Articles of Agreement, valid and legal both by their terms and on their face under appropriate rules of contract interpretation are not made any less so because they do not contain provisions expressly prohibiting the possibility of illegal action. *NLRB v. Mountain Pacific Chap., AGC*, 270 F.2d 425 (9th Cir. 1959). Appellants need not negate every remote and slight possibility that the Articles of Agreement might be in effect when some illegal act occurs in the distant future.

By reference to *Mountain Pacific Chap.*, appellants are not throwing motivation into the hopper, as the appellee would assert (Ans. Br. pp. 7-8). The above rule, enunciated by this Court, was applied in testing the contract in *Mountain Pacific Chap.* "by its terms" and before ever reaching the question as to its motivation or intent.

The Articles of Agreement, tested by their terms, are valid and legal, and appellants do not object to the proposition that they be examined in this light. If, however, as would be appropriate under Los Angeles Building and Construction Trades Council, 151 NLRB 83, 1965 C.C.H. NLRB 9191, the Articles of Agreement are examined for legality through Sec. 8(e) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(e)) by reference to the motivation and intent behind their adoption and application, it will certainly be concluded that the record of this case nowhere supports a finding that they be applied otherwise than in a legal manner.

It is amazing to appellants that appellee would contend that all the court and board decisions set out in its string of citations at pages four and five of appellee's answering brief support and properly establish that appellants' picketing was in violation of Sec. 8(b)(4)(i)(ii)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158 (b)(4)(i)(ii)(A)). Examining particularly the court decisions cited, it is to be noted that three of them (*Drivers Local 695 v. NLRB*, 361 F.2d 547 (D.C. Cir. 1966); *NLRB v. Teamsters Local 294*, 342 F.2d 18 (2d Cir. 1965); and *Teamsters Local 413 v. NLRB*, 334 F.2d 539 (D.C. Cir. 1964)) involve the legality of subcontracting clauses applicable to over-the-road and short-haul truckers, in some instances relating to employees having no connection with the building and construction industry. Those cases are entirely irrelevant to an analysis of the Oregon State Council Articles of Agreement (Jt. Ex. 1), which relates solely to the contracting and subcontracting of work to be performed at a job site by employers in the construction industry. The remaining court decision (*NLRB v. Carpenters, AFL-CIO*, 382 F.2d 593 (9th Cir. 1967) and the Board decisions cited which appellee asserts should bear on the decision of the instant case completely fail to take into account the applicable rules of contract interpretation set forth above and in appellants' opening brief (Op. Br. 13-17).

Appellants respectfully and strongly urge that

this Court re-examine its holding in *NLRB v. Carpenters, AFL-CIO*, supra, as well as its affirmation of the Board ruling in *NLRB v. Lane-Coos-Curry-Douglas B. T. C.*, No. 20,783, 9th Cir., August 9, 1967, and adopt the rule of reason and fairness in contract interpretation which appellants support and which has consistently been upheld by federal case law. If read in their entirety, the Articles of Agreement, in their provisions relating to subcontracting of work and picketing, are limited to situations involving work to be done at construction job sites. But even if construed in a narrower fashion, their language is subject to a legal and valid interpretation, which should appropriately be adopted by this Court. The Articles of Agreement are within the construction industry proviso to Sec. 8(e) and picketing to obtain their execution did not violate Sec. 8(b)(4)(i)(ii)(A). *Carpenters, Local 383 v. NLRB*, 323 F.2d 422 (9th Cir. 1963).

III

The Record and Evidence Fail to Support the Trial Court's Award of Damages.

Appellants and appellee are in agreement that the proper method of accounting for purposes of determining the existence or non-existence of lost profit as an element of damages is on an accrual basis. (See testimony of expert witnesses called by both parties, Tr. 226-231, 261-264). Use of the accrual method, as opposed to the cash basis asserted by appellee,

even in the face of his own expert's testimony, results in an entirely different computation of any alleged lost profit and establishes beyond doubt, or certainly by a preponderance of the evidence, that no such damages exist. (See Defendants' Brief on Damages, Cr. S. 66-70).

Appellee's assertion, relying on the testimony of his accountant, that use of the cash or accrual system will lead to the same result (Ans. Br. 10) is precisely contrary to the evidence in the record. The appellee's accountant testified that he had used only money actually received in his computations when comparing the two systems and did not include billings made by the appellee to others (Tr. 245-246). His testimony is entirely inaccurate as to what the appellee's books showed on an accrual basis. It should not be relied on or given any weight by this Court or the trial judge.

Secondly, with the possible exception of \$519.18 relating to increases in wage rates, defendants' brief on damages (Cr. S. 61-78) clearly displays the fallacious quality of appellee's claim of damages for general overhead, job overhead and critical path analysis. Those elements are simply non-existent.

Appellee's allegation that appellants concede damages in a larger amount than that awarded by the trial court (Ans. Br. 10) shows only that he fails to understand or wishes to ignore the appellants' basic contentions. Both here (Op. Br. 17-18) and before the trial court (Defendants' Brief on Dam-

ages, Cr. S. 61-78) appellants have, by clear and convincing evidence, shown that appellee is entitled to nothing by way of damages. Appellants have no quarrel with appellee's theory that damages, once proven, need not be computed with mathematical certainty (Ans. Br. 8-9), but this theory does not excuse the appellee from the burden of proving initially the existence of damages, regardless of their mathematical computation. It is this burden which the appellee has failed to carry.

Due to the trial court's failure to comply with the requirement of Rule 52(a) it is impossible for the appellants to discover what erroneous reasoning the trial court applied in arriving at a damage award. What is certain is that an examination of the record and the use of proper accounting procedures show the award to be without basis or support.

CONCLUSION

For the reasons set forth, both here and in Appellants' Opening Brief, it is respectfully submitted that this case be remanded to the trial court with the direction that findings of fact and conclusions of law be entered in conformity with Rule 52(a) of the Federal Rules of Civil Procedure.

In the alternative, if this Court does not see fit to remand the case on the above ground, it is respectfully submitted that the trial court's finding that defendant-appellants' picketing was in violation of law be reversed and its assessment of damages be va-

cated as unsupported by the record or that the case be remanded for a proper assessment of damages, if any, in conformity with the evidence.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL T. BAILEY

Of Attorneys for the Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LES SCHWIMLEY MOTORS, INC.,

Appellant,

vs.

CHRYSLER CORPORATION,

Appellee.

No. 22450 ✓

JUN 12 1958

APPELLANT'S OPENING BRIEF

Appeal from Order Dismissing Action by
The Federal District Court
for the
District of Nevada

Honorable Bruce R. Thompson, Judge

FILED

JUN 11 1958

MM. B. LUCK, CLERK

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TABLE OF CONTENTS

| | Pages |
|---|-------|
| JURISDICTION | 1 |
| INTRODUCTION | 1 |
| ARGUMENT | 4 |
| I. THE APPROPRIATE LAW TO BE APPLIED TO ANY LITIGATION IS THE ENTIRE LAW OF THE FORUM HAVING THE MOST SIG- NIFICANT CONTACTS WITH THAT LITIGATION | 4 |
| II. RULE 17b OF THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD BE DISREGARDED WHEN THE RESULTS OF ITS APPLI- CATION WOULD BE IN CONFLICT WITH THE POLICY CONSID- ERATIONS OF THE LOCAL FORUM WHERE THE LOCAL FORUM HAS THE MOST SIGNIFICANT CONTACTS WITH THE LITIGATION BEFORE THE COURT | 10 |
| CONCLUSION | 12 |

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| | |
|--|--------|
| Babcock vs. Jackson, 12 NY2d 473, 191 NE2d 279 | 9,10 |
| Chenoweth vs. Atchison, Topeka and Santa Fe Railroad, 229 Fed. Supp. 540 | 8 |
| Power City Communications vs. Calaveras Telephone Co., 280 Fed. Supp. 808 | 11 |
| Travelers Insurance Co. vs. Workmen's Compensation Appeals Board, 68 AC 1 | 7 |
| Van Dusen vs. Barrack, 376 U.S. 612 | 5,8,12 |

Codes and Statutes

| | |
|--|--------------|
| Federal Rules of Civil Procedure, Sec. 17b | 4,5,10,11,12 |
| Nevada Revised Statutes, 78.585 | 4,7 |
| 28 USCA 1291 | 1 |
| 1294(1) | 1 |
| 1332 | 1 |
| 1404(a) | 2 |
| 1406(a) | 2 |

Texts

| | |
|-------------------------|---|
| 30 NACCA Law Journal 35 | 9 |
| 75 Yale Law Journal 90 | 7 |

Transcripts

Transcript of Record, page 2 to 11, Complaint

Transcript of Record, page 13 and 14, Notice of Motion
and Motion

Transcript of Record, page 21 and 22, Notice of and Motion
for Change of Venue

Transcript of Record, page 23 to 27, Affidavit in Support
of Memorandum for Change
of Venue

Transcript of Record, page 28 to 36, Memorandum of Points
and Authorities in Support
of Motion for Change of Venue

Transcript of Record, page 69 and 70, Supplemental Memorandum
in Support of Motion for Change
of Venue

Transcript of Record, page 72, Certificate of Revivor

Transcript of Record, page 79 to 84, Memorandum and Order

Transcript of Record, page 88 to 100, Order Dismissing Action

1 UNITED STATES COURT OF APPEALS

2 FOR THE NINTH CIRCUIT

3 LES SCHWIMLEY MOTORS, INC.,)

4 Appellant,)

5 vs.)

6 CHRYSLER CORPORATION,)

7 Appellee.)

No. 22450

APPELLANT'S OPENING BRIEF

8
9 JURISDICTION

10 The above action was filed in the Federal District Court of the Eastern
11 District of California on the basis of a diversity of citizenship action
12 wherein plaintiff, a California corporation, was suing defendant, a Delaware
13 corporation, for an amount in excess of \$10,000.00. (See Title 28 U.S.C.A.
14 1332, Complaint, Transcript of Record, page 3) The matter was thereafter
15 transferred upon proper motion to the Federal District Court for the District
16 of Nevada. (Memorandum and Order, Transcript of Record, page 84) The Nevada
17 Court upon motion made by defendant dismissed the action. (See Order Dis-
18 missing Action, Transcript of Record, page 98 to 100) This appeal was taken
19 from that order of dismissal by virtue of 28 U.S.C.A. 1291 and 28 U.S.C.A.
20 1294(1).

21 INTRODUCTION

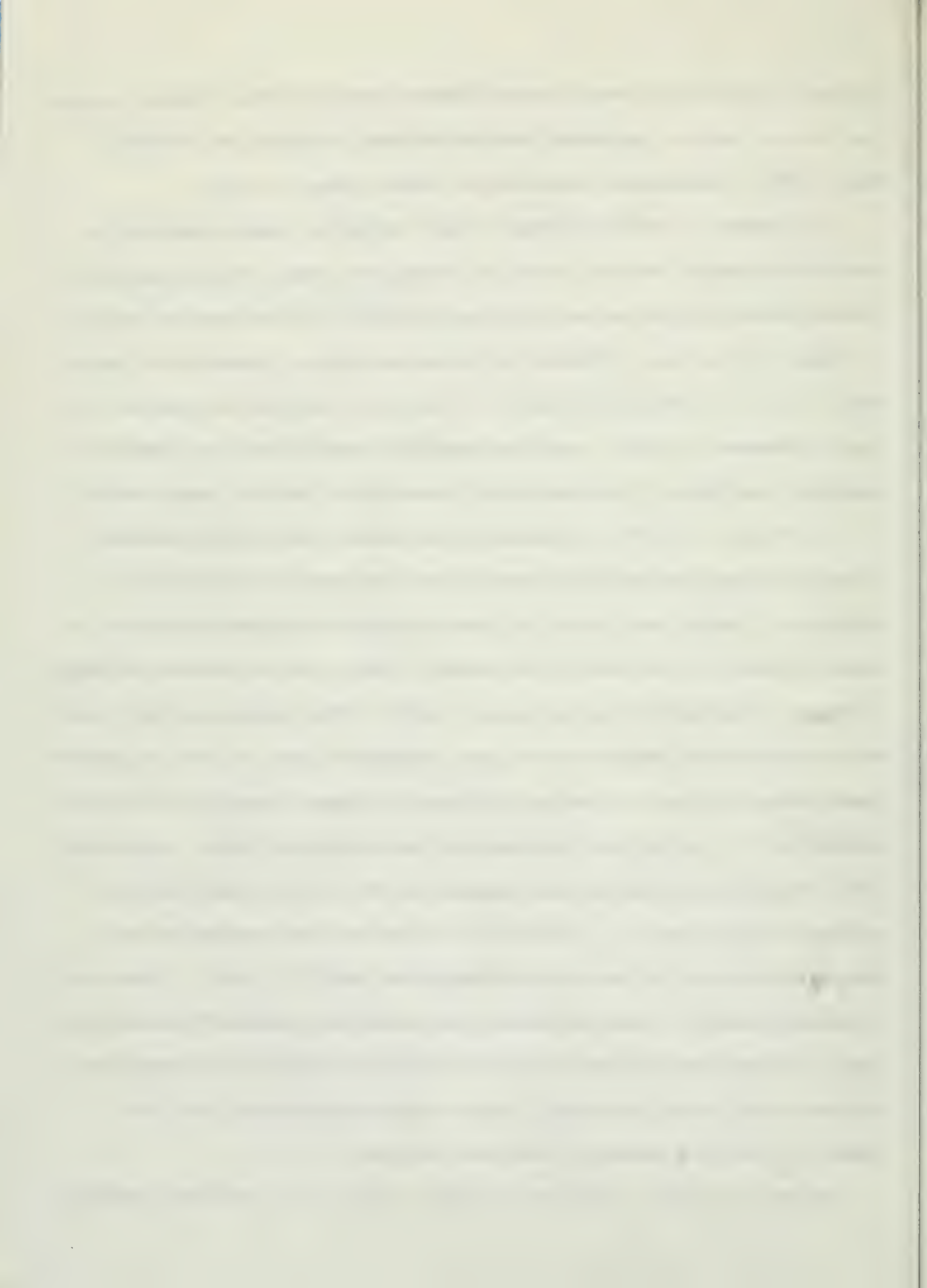
22 Plaintiff, a California corporation, first filed its complaint in the
23 above entitled action November 4, 1966 in the United States District Court
24 for the Eastern District of California. The complaint encompasses six
25 causes of action against Chrysler Corporation growing out of that corpora-
26 tion's discontinuance of the Desoto line of automobile in November of 1960.

1 At that time plaintiff was a Desoto Plymouth dealer in Reno, Nevada, operat-
2 ing under a dealers' agreement executed between plaintiff and defendant
3 May 1, 1958. (Complaint, Transcript of Record, page 2 to 11)

4 On January 4, 1967, defendant filed a Motion to Dismiss plaintiff's
5 complaint claiming that all causes of action were time barred by the Cali-
6 fornia statute of limitations including plaintiff's first cause of action
7 for breach of contract. (Notice of Motion and Motion, Transcript of Record,
8 page 13 and 14) The discontinuance of Desoto by Chrysler Corporation oc-
9 curred November 18, 1960, some five years, 351 days before the plaintiff's
10 complaint was filed. (See Complaint, Transcript of Record, page 4 and 5)

11 On February 23, 1967, in answer to defendant's Motion for Dismissal,
12 plaintiff filed a Motion for Change of Venue pursuant to provisions of
13 28 U.S.C.A. 1404(a) and 1406(a) to have the matter transferred to the U. S.
14 District Court for the District of Nevada. (Notice of and Motion for Change
15 of Venue, Transcript of Record, page 21 and 22) This motion was made based
16 on the premise that Nevada was the most convenient forum to hear the matter.
17 (Memorandum in Support of Motion for Change of Venue, Transcript of Record,
18 page 28 to 36) At the time the Complaint was originally filed, the plain-
19 tiff corporation was not in good standing in California having failed to
20 pay certain State taxes. A certificate of revivor was executed by the
21 Franchise Tax Board of the State of California April 21, 1967. (Transcript
22 of Record, page 72) Notwithstanding the problem of plaintiff's capacity to
23 sue at the time the suit was filed, the California statute of limitations
24 had barred all six of plaintiff's causes of action including his first
25 cause of action for breach of a written contract.

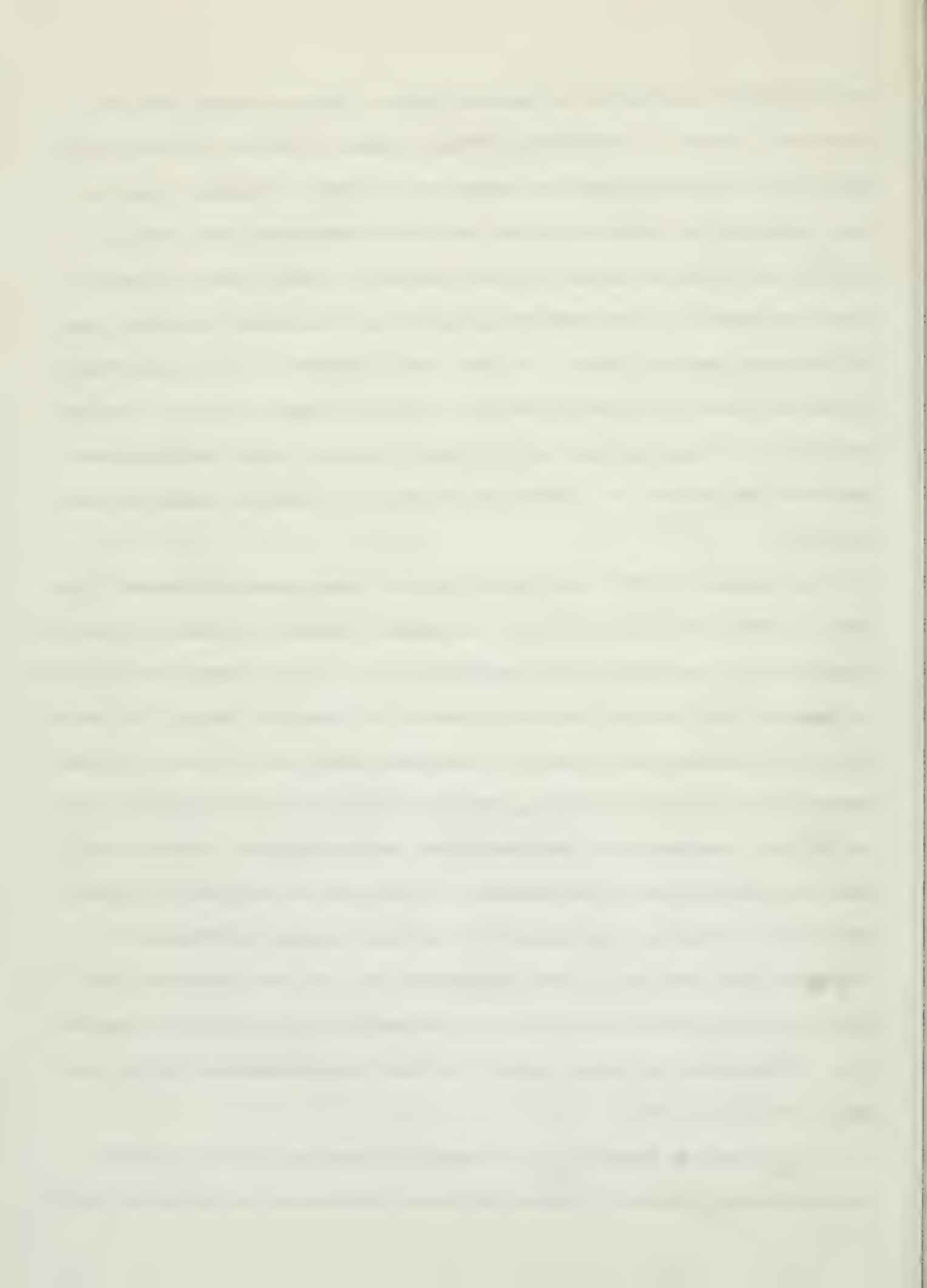
26 On June 30, 1967, the Federal District Court for the Eastern District



1 of California transferred the case to the U. S. District Court for the
2 District of Nevada. (Transcript of Record, page 79 and 84) In its opinion
3 the California court found that Nevada was the more convenient forum and
4 also expressed its belief that the law of the transferee forum should be
5 applied including the Nevada six year statute of limitations for breach of
6 a written contract. (See Memorandum and Order, Transcript of Record, page
7 83 line 4 to page 84 line 5) At this point, plaintiff had conceded that if
8 it had any cause of action it was only under the first cause of action for
9 breach of a written contract for all other theories in the complaint were
10 barred by the statute of limitations whether California or Nevada law was
11 applied.

12 On November 7, 1967, the Nevada District Court granted defendant's mo-
13 tion to dismiss the entire action. Defendant's Motion for Dismissal had been
14 transferred to the Nevada Court unrulled upon by the California Court when the
15 California Court granted plaintiff's Motion for Change of Venue. The Nevada
16 Court in dismissing the plaintiff's complaint found that in fact the Nevada
17 statute of limitations did apply, but that the plaintiff corporation, since
18 not in good standing under California law, had no capacity to sue at the
19 time the complaint was filed November 4, 1966, nor at the time the Nevada
20 statute of limitations for breach of a written contract ran November 18,
21 1966, and that under Rule 17b of the Federal Rule of Civil Procedure the
22 capacity of a corporation to sue was governed by the state of its organiza-
23 tion. (Transcript of Record, page 98 to 100, Order Dismissing Action, see
24 page 2 lines 22 to 24)

25 It is from the Nevada Court's wooden application of Rule 17b which
26 determines that plaintiff's capacity to sue is governed by the law of Cali-



1 fornia that plaintiff has taken this appeal.

2 ARGUMENT

3 I. THE APPROPRIATE LAW TO BE APPLIED TO ANY LITIGATION
4 IS THE ENTIRE LAW OF THE FORUM HAVING THE MOST SIGNI-
5 FICANT CONTACTS WITH THAT LITIGATION

6 Under Nevada law (78.585 Nevada Revised Statutes) a corporation has
7 capacity to file and prosecute a cause of action even though not in good
8 standing at the time the complaint is filed. The Federal District Court of
9 the District of Nevada has already ruled that the Nevada six year statute
10 of limitation applies to plaintiff's first cause of action. (See Order
11 Dismissing Action, Transcript of Record, page 99, lines 22 to 24) We are
12 therefore here concerned with the application of Rule 17b of the Federal
13 Rules of Civil Procedure which when applied to this cause eliminates plain-
14 tiff's capacity to sue since at the time the complaint was filed in Cali-
15 fornia the plaintiff was not in good standing in California and was there-
16 fore under California law lacking capacity to file the lawsuit. It is
17 plaintiff's position (1) Nevada has the most significant contacts with the
18 issues of the litigation and the greatest interest in its outcome and (2)
19 under Nevada law the plaintiff corporation had the capacity to file and
20 proceed with the complaint. Therefore the Nevada Court should apply the
21 local forum rule governing a corporation's capacity to sue and disregard
22 the application of Rule 17b as producing a result conflicting with the
23 Nevada policy governing capacity and not in keeping with the enlightened
24 trend of the Conflict of Laws that the law of the forum with the most sig-
25 nificant contacts with the litigation should be applied to govern that
26 litigation.

 The defendant, while arguing against plaintiff's Motion for Change of

1 Venue which was subsequently granted, reasoned that under the holding in
2 Van Dusen vs. Barrack, 376 U.S. 612, a change of forum pursuant to the
3 federal statute can never result in a change of law. As the plaintiff in
4 its Memorandum in Support of that Change of Venue (Transcript of Record,
5 page 33 line 11 to page 34 line 5) and the District Court for the Eastern
6 District of California in their Memorandum and Order granting that change
7 of venue pointed out (Transcript of Record, page 82 lines 6 to 10), Van
8 Duson specifically limited its decision by saying:

9 "We do not and need not consider whether in all cases 1404(a)
10 would require the application of the law of the transferor as
11 opposed to the transferee's state. We do not attempt to deter-
12 mine whether for example the same considerations would govern
13 if a plaintiff sought transfer under 1404(a)."

14 Why would the Federal Court in Sacramento transfer to preserve the
15 plaintiff's cause of action against application of the California statute
16 of limitations when it was cognizant that a strict application of Rule 17b
17 would force the Nevada Court to apply California law regarding capacity of
18 a corporation to sue and thereby dismiss plaintiff's complaint? The Cali-
19 fornia Court transferred the case expressing its belief that the Nevada
20 Court should apply the law of the transferee forum on the reasoning that
21 Nevada had the greatest interest in the proceedings.

22 "Particularly whereas here the plaintiff could have with equal
23 right proceeded in either forum. It does not seem unreasonable
24 to allow him to invoke the substantial state policies to which
25 he was entitled." (Memorandum and Order Granting Change of
26 Venue, page 4, Transcript of Record page 82 lines 11 through 14)

27 The California Eastern District Court was speaking of the substantial
28 policies of the State of Nevada and went on to say in this connection:

29 "The American law institute in its impressive study of the
30 division of jurisdiction between state and federal courts
31 has proposed in those cases where the plaintiff moves for

1 a change of venue, the law of the new forum should be
2 applied (see proposed final draft number 1 (1965) section
3 1306(c), page 21 and the commentary at page 99 et seq.).
4 The institute is in full accord with the Van Dusen rule
5 but view it as being applicable only to protect the
6 plaintiff in those cases where transfer would abrogate
7 the legal right that was invoked in the Federal Court.
8 While the wooden application of that rule to all venue
9 transfer cases had a certain symmetry, it is nonetheless
10 unsound. As the institute recognizes the interests to
11 be protected are quite different when the plaintiff seeks
12 to transfer a case to a forum in which he could have
13 initially instituted his suit." (Transcript of Record,
14 page 82 line 17 to page 83 line 3)

15 The Federal District Court of the Eastern District of California trans-
16 ferred the plaintiff's cause of action because it felt Nevada to be the most
17 convenient forum to hear the case. It is certainly implicit in that deci-
18 sion that the court also felt that Nevada had the most significant contacts
19 with the litigation.

20 The plaintiff is a California corporation in name only. All its busi-
21 ness was conducted in Nevada and all its assets were located in Nevada.
22 Its debtors and creditors were located in Nevada. California has no inter-
23 est in having its rules of capacity apply for whether this lawsuit is pur-
24 sued successfully or unsuccessfully, it in no way affects nor is it in any
25 way connected with the operation or the policies of the State of California.
26 The plaintiff corporation was a dormant entity which had operated and
27 failed all in Nevada and although not in good standing in Nevada to carry
28 on business due to certain procedural deficiencies at the time this suit
29 was originally filed, it was capable under Nevada law of filing and pur-
30 suing a lawsuit. (See Affidavit in Support of Memorandum for Change of
31 Venue, Transcript of Record page 23 to 27, Supplemental Memorandum in
32 Support of Motion for Change of Venue, Transcript of Record, pages 69 and 70,

1 and 78.585 of the Nevada Revised Statutes) To apply the law of California
2 concerning the capacity of the plaintiff to file a lawsuit is to totally
3 disregard the relevant interest test determining what law to apply where
4 there are competing forums involved. In December of 1967, in Travelers
5 Insurance Company vs. Workmen's Comp. Appeals Board, the California Supreme
6 Court speaking through Justice Tobriner stated its present position in this
7 area of the law when it said:

8 "California has rejected the traditional mechanical solutions
9 of choice of law problems and adopted foreign law only when
10 it is appropriate in light of the significant interest in the
11 particular case. The significance of extra state elements
varies directly with the nature of the forum's interest in
a given case." (Travelers Insurance Company vs. Workmen's
Comp. Appeals Board, 68 AC 1, page 1)

12 Nevada has expressed its legislative intent concerning the capacity of
13 a corporation to sue when not in good standing. (See 78.585 Nevada Revised
14 Statutes) Why should plaintiff corporation which is pursuing a cause of
15 action found to be more appropriate in Nevada be precluded from pursuing
16 an action proper in the local forum by laws of a foreign forum which both
17 the courts of the local and foreign forum have concluded has a subordinate
18 interest to the local forum in the cause of action?

19 In an extensive treatment of this subject in Volume 75 of the Yale
20 Law Journal, which gives an analysis of all the major cases in the area,
21 the author indicates that the article's purpose is to

22 "propose treating the question of applicable law after trans-
23 fer of venue as one best resolved by independent federal choice
24 of law which would apply those laws of the state which best
effectuates state policy interest in the particular case."
(See page 92)

25 At page 107 the article goes on:

26 "If Erie's (Erie R. Co. vs. Tompkins, 304 U.S. 64) purpose of

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1 allowing maximum expression of local policies is to be fully
2 achieved, a flat rule choosing either the law of the transferee
3 or that of the transferor in all cases must be rejected. In-
4 stead, Courts should use methods development by modern Conflict
of Laws theorists to choose that state law whose application
in a particular case best effectuates the policy goal served
by the law."

5 The article in discussing capacity to sue puts forth the premise
6 that in determining capacity an interest analysis should apply and might
7 have been used to reach the same result as that of Van Dusen, supra, where
8 the court protected the plaintiff's right by applying the law of the trans-
9 feror forum.

10 "This approach calls for a consideration of the substantive
11 contacts of the state laws in competition and the specific
12 policy goals which the laws were designed to achieve . . .
13 The court would measure state's interest in having its law
14 applied by the extent to which the application of its law
15 to the particular facts would effectuate the policy goals
of the law and by the extent to which non-application of
the law would frustrate its goals. The law selected would
be the law of the state with the greatest interest in its
application."

16 The Law Journal article cites Chenoweth vs. Achison, Topeka and Santa
17 Fe Railroad, 229 Fed. Supp. 540, for the proposition that in fact the court
18 in that case made an interest analysis to determine the issue of capacity.
19 In the Chenoweth case, the matter was transferred from Colorado back to
20 Kansas where the case was originally filed in order for the Kansas Court to
21 determine which state law should determine capacity to sue. The Colorado
22 Court in re-transferring the case listed a number of interest elements which
23 the Kansas Court could consider in making its determination.

24 "We think it proper that a Court familiar with the Kansas law
25 should specify which state's law governs capacity to sue in a
wrongful death action brought in Kansas."

26 Certainly the thrust of this decision is that capacity to sue should be

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1 determined by the law of the forum which has the greatest contacts with
2 the litigation and the greatest interest in the outcome of the litigation.
3 In the case presently before the Appellate Court, the California court
4 specifically states that the Nevada statute of limitations should apply and
5 inferred that the Nevada rules as to capacity should be applied. If this
6 were not the case, the California Court certainly would not have performed
7 the idle act of transferring venue to the Nevada Court in the first place.

8 In Babcock vs. Jackson, 12 New York 2d 473, 191 Northeast 2d 279 (1968),
9 the New York Court applied its own no guest statute bar to an accident oc-
10 ccurring in Ontario involving New York citizens on the reasoning that the New
11 York Court had the more relevant interest. Thomas F. Lambert, Jr., dis-
12 cussing the decision and in commenting on the so-called center of gravity
13 theory in 30 NACCA Law Journal, page 35, says at page 39:

14 "As Judge Foll pointed out in Babcock, a similarly inflexible
15 choice of law rule in the field of contracts rooted like the
16 torts rule in the Vested Rights Doctrine referred all matters
17 bearing upon the execution interpretation and validity of a
18 contract of the place where the contract was made . . . dis-
19 illusioned by the arbitrariness of this traditional rule the
20 New York Courts have led a successful revolt in the contracts
field and have forced adoption of an infinitely more flexible
rule, namely, the most significant relationship concept cul-
minating in the accolade of approval of the American Law In-
stitute in its contracts draft for the second conflicts re-
statement."

1 Lambert (page 47) goes on to comment upon and quote from the writing of
2 Bernard Currie on the subject:

3 "Even Professor Bernard Currie, who has made so much sense,
4 brilliant, consecutive, and cumulative in the conflicts area
5 of torts and who has been sinking critical switchblades into
6 the 'center of gravity' and 'grouping of contacts' test as
being unimplemented metaphorical phrases, is heartened by
Babcock. While he would abandon 'center of gravity' and other
'pagan metaphorical phrases' still I cannot complain overmuch

1 however when the Court while speaking the language of metaphor
2 explicitly decided the case in the most reasonable and objec-
3 tive way that seems possible: By reference to the policies
4 and interests of the respective states, by construction and
5 interpretation of the respective laws, the center of gravity
6 has come of age. Cheery comment on Babcock vs. Jackson, 63
7 Columbia Law Review 1233, 1234, 1243, 1963."

8 While the Babcock case applied specifically to the field of torts, it
9 is apparent that the writers and the most enlightened rulings in the Con-
0 flict of Laws are using the center of gravity or significant contacts theory
1 as a means of answering problems like the one presently before the Court.
2 Professor Lambert in his final paragraph makes the following statement re-
3 ferring to Babcock:

4 "This basic concept rejecting the artificial wooden and
5 mechanical place of injury rule in interstate tort situa-
6 tions and replacing it with a balancing of interests of
7 the states concerned explicitly seeking 'the center of
8 gravity' of the occurrence makes Babcock one of the major
9 endurable decisions in the modern conflicts of law of
0 torts. In its approach Babcock is policy-oriented, not
1 situs obsessed. Its interest analysis, its quest for
2 the center of gravity of the occurrence is surely a key
3 to unlock the future in the conflicts area of torts and
4 its insight that purpose is more relevant than place
5 gives it a sure warrant of enduring worth in the long
6 tally of time."

7 Certainly Professor Lambert is not limiting this type of thinking in the
8 conflict of laws to the area of torts. He is advocating the reasoning be-
9 hind the Babcock decision for any area of the law where choice of law be-
0 comes a problem.

1 II. RULE 17b OF THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD
2 BE DISREGARDED WHEN THE RESULTS OF ITS APPLICATION WOULD
3 BE IN CONFLICT WITH THE POLICY CONSIDERATIONS OF THE LOCAL
4 FORUM WHERE THE LOCAL FORUM HAS THE MOST SIGNIFICANT CON-
5 TACTS WITH THE LITIGATION BEFORE THE COURT.

6 The concept that the law of the forum with the most significant con-
7 tacts governs capacity has recently been applied in the face of Rule 17b of

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1 the Federal Rules of Civil Procedure. (See Power City Communications vs.
2 Calaveras Telephone Company, 280 Fed. Supp. 808) The case involved a
3 Washington corporation suing in California in the Federal Court for the
4 Eastern District of California. In that case, the Eastern District Court
5 applied the California State Rule of Law concerning capacity of corpora-
6 tions to sue rather than the Federal Rule 17b providing that capacity of
7 corporations to sue or be sued be determined by the law under which the
8 corporation was organized. The Court determined that the California Con-
9 tractors Licensing statute affecting the plaintiff corporation's capacity
10 to sue was more important to apply than Rule 17b which would have applied
11 the law of the State of Washington.

12 "Here we are dealing with Rule 17b which by referring to the
13 laws of the State of organization of a corporation is in-
14 herently non-uniform in its application. The competing inter-
15 ests here are really not between California and the Federal
16 Rules but between California and Washington with all signifi-
17 cant parts of the transaction taking place in California."

18 The Court in this case made an interest analysis and applied the law of
19 the local forum as against Rule 17b and Washington law which Rule 17b
20 called for.

21 The following statement from 75 Yale Law Journal, page 132, supplied
22 further authority for the proposition that the Federal Court when faced
23 with a choice of law problem, should, even in the face of established rules,
24 apply the law of the forum with the greatest interest in the litigation.

25 "Modern conflicts theory makes it absurd to argue that forcing
26 Federal Courts mindlessly to follow traditional choice of law
rules which ignore the content of internal rules they choose
best serves the purpose of effectuating local policies. The
spectra of an independent federal judiciary frustrating local
policy is no longer realistic. In fact, the federal judiciary
in its unique posture of neutrality is better suited than

1 state judges to be an arbiter between the interest of states
2 deciding conflicts cases according to the principle of effec-
3 tuating the policy goals expressed by internal laws . . . the
4 prospects of a more equitable result in mere transfer cases
5 and greater effectuation of local policy should make an interest-
6 discriminative solution worth the try."

7 CONCLUSION

8 The progressive courts are providing the basis for the development of
9 two concepts in determining choice of law problems; (1) that wherever pos-
0 sible the plaintiff's cause of action must be preserved in its fullest
1 potential so that its merits may be decided after a full hearing in court,
2 (Van Dusen holding, see Transcript of Record, page 33 to 35, Memorandum in
3 Support of Motion for Change of Venue, page 6 line 11 to page 8 line 5,
4 and cases cited therein) and (2) that the local court in deciding what law
5 to apply should apply the law of the forum which has the greatest interest
6 in and contacts with the litigation before it. Both of these concepts
7 applied to the situation presently before the Court require that the Nevada
8 forum apply the laws of Nevada in all its particulars and reject the appli-
9 cation of California law. This is not a matter of forum shopping. This
0 is a matter concerned with applying the law of the forum with the most
1 significant contacts with the litigation. Under this theory even if the
2 action remained in California, the California Court would be required to
3 apply laws of the State of Nevada to this controversy.

4 If the law of California is applied, through the use of Rule 17b, the
5 plaintiff corporation will be precluded from pursuing a valid cause of
6 action due to law resulting from the policy of a state having no substan-
7 tial connection with the parties or the litigation. The defendant corpora-
8 tion, on the other hand, will escape the necessity of having to defend itself

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MEMORANDUM

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FROM: THE PRESIDENT

SUBJECT: [Illegible]

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[Illegible]

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in a court of law for having breached a contract resulting in the demise of plaintiff's business and will escape this obligation due to the application of a forum's law unrelated to the place where the business was carried on and unaffected by the economic repercussions to the community and parties of that business failure.

Respectfully submitted,

WILKINS & MIX

Brian D. Flynn

Attorneys for Appellant

Dated at Sacramento, California
this 13th day of June, 1968.

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No. 22450

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In the
United States Court of Appeals
For the Ninth Circuit

LES SCHWIMLEY MOTORS, INC.,

Appellant,

VS.

CHRYSLER CORPORATION AND CHRYSLER
MOTORS CORPORATION,

Appellees.

Appellees' Brief

FILED

On Appeal from the United States District Court
for the District of Nevada

JUL 12 1968

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SUBJECT INDEX

| | Page |
|---|------|
| I. Statement of the case..... | 1 |
| A. The proceedings in the United States District Court for the Eastern District of California..... | 1 |
| B. The proceedings in the Nevada District Court..... | 4 |
| C. The issues on this appeal..... | 6 |
| 1. The first issue | 6 |
| 2. The second issue | 6 |
| II. Argument | 7 |
| A. First Issue : whether Rule 17 (b) should be disregarded | 7 |
| 1. Rule 17 (b) is the same as the Nevada Rule..... | 8 |
| 2. Rule 17 (b) is binding on the Nevada District Court, and on this Court, even if it were contrary to the Nevada Rule..... | 9 |
| 3. The proposition that enlightened conflicts law supports appellant's contentions is wrong..... | 11 |
| B. Second Issue : whether the same California statute of limitations which barred this action in California barred it in Nevada, too..... | 16 |
| Conclusion | 20 |

TABLE OF AUTHORITIES

| CASES | Pages |
|--|-------|
| Babeock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963).... | 13 |
| Bolten v. General Motors Corp., 81 F.Supp. 851 (N.D. Ill. 1949), reversed on other grounds, 180 F.2d 379 (7th Cir. 1950), cert. den., 340 U.S. 813 (1950)..... | 18 |
| Boyle v. Lakeview Creamery Co., 9 C.2d 16, 68 P.2d 968 (1937) | 3 |
| Callan v. Lillybelle, Ltd., 234 F.Supp. 773 (D. N.J. 1964)..... | 16 |
| Carr v. American Universal Insurance Co., 341 F.2d 220 (6th Cir. 1965) | 17 |
| Chenoweth v. Atchison, Topeka and Santa Fe Railroad Co., 229 F.Supp. 540 (D. Colo. 1964)..... | 15 |
| Cleveland v. Gore Bros., Inc., 14 C.A.2d 681, 58 P.2d 931 (1936) | 5 |
| Commissioner of Internal Revenue v. Stimson Mill Co., 137 F.2d 286 (9th Cir. 1943)..... | 7 |
| Edwards v. American Home Assurance Company, 361 F.2d 622 (9th Cir. 1966)..... | 9 |
| Exchange Nat. Bank of Olean v. Insurance Co. of North America, 341 F.2d 673 (2nd Cir. 1965), cert. den., 382 U.S. 816 (1965) | 17 |
| Fidelity Metals Corp. v. Risley, 77 C.A.2d 377, 175 P.2d 592 (1946) | 10 |
| Glennan v. Lincoln Inv. Corporation, 110 F.2d 130 (D.C. Cir. 1940) | 10 |
| Goldlawr, Inc. v. Herman, 369 U.S. 463 (1962)..... | 16 |
| H. L. Green Co. v. MacMahon, 312 F.2d 650 (2nd Cir. 1962), cert. den., 372 U.S. 928 (1963)..... | 17 |
| Greve v. Gibraltar Enterprises, Inc., 85 F.Supp. 410 (D. N.Mex. 1949) | 17 |
| Hanna v. Plumer, 380 U.S. 460 (1965)..... | 9 |
| Hargrove v. Louisville & Nashville R.R. Co., 153 F.Supp. 681 (W.D. Ky. 1957) | 18 |
| Hausman v. Buckley, 299 F.2d 696 (2nd Cir. 1962), cert. den., 369 U.S. 885 (1962) | 15 |

| | |
|---|--------|
| Headrick v. Atchison, T. & S. F. Ry. Co., 182 F.2d 305 (10th Cir. 1950) | 17 |
| Horwitz v. Food Town, Inc., 367 F.2d 584 (5th Cir. 1966)..... | 11 |
| Jaffke v. Dunham, 352 U.S. 280 (1957)..... | 7 |
| Kitheart v. Metropolitan Life Ins. Co., 150 F.2d 997 (8th Cir. 1945), cert. den., 326 U.S. 777 (1945)..... | 7 |
| Klaxon Co. v. Stentor Co., 313 U.S. 487 (1941)..... | 2, 15 |
| Laughlin v. Eicher, 145 F.2d 700 (D.C. Cir. 1944), cert. den., 325 U.S. 866 (1945)..... | 7 |
| Leyden v. Excello Corp., 188 F.Supp. 396 (D. N.J. 1960)..... | 16, 18 |
| Mack Trucks, Inc. v. Bendix-Westinghouse Auto. A. B. Co., 372 F.2d 18 (3rd Cir. 1966), cert. den., 387 U.S. 930 (1967) | 14 |
| MacMillan Petroleum Corp. v. Griffin, 99 C.A.2d 523, 222 P.2d 69 (1950) | 10 |
| R. V. McGinnis Theatres & Pay T.V. v. Video Independent Th., 386 F.2d 592 (10th Cir. 1967), cert. den., U.S. (April 1968) | 10 |
| Mississippi Pub. Corp. v. Murphree, 326 U.S. 438 (1945)..... | 9 |
| Old Fashion Farms v. Hamrick, 253 A.C.A. 273, 61 Cal. Rep. 254 (1967) | 5 |
| Power City Communications, Inc. v. Calaveras Telephone Co., 280 F.Supp. 808 (E.D. Calif. 1968)..... | 11 |
| Pruess v. Udall, 359 F.2d 615 (D.C. Cir. 1965)..... | 16 |
| Quinn v. Simonds Abrasive Co., 199 F.2d 416 (3rd Cir. 1952), cert. den., 345 U.S. 964 (1953)..... | 18 |
| Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 Pac. 446 (1922) | 5 |
| Riley Co. v. Commissioner, 311 U.S. 55 (1940)..... | 7 |
| Roberts Bros. Inc. v. Kurtz Bros., 231 F.Supp. 163 (D. N.J. 1964) | 20 |
| Roberts Bros. Inc. v. Kurtz Bros., 236 F.Supp. 471 (D. N.J. 1964) | 16 |

| | Pages |
|--|----------------|
| Sedgwick v. Beasley, 173 F.2d 918 (D.C. Cir. 1949)..... | 10 |
| Sevits v. McKiernan-Terry Corporation, 264 F.Supp. 810 (S.D. N.Y. 1966) | 10 |
| Sibbach v. Wilson & Co., 312 U.S. 1, modified, 312 U.S. 655 (1941) | 9 |
| State Farm Mutual Automobile Ins. Co. v. Thompson, 372 F.2d 256 (9th Cir. 1967)..... | 9 |
| State of Ohio Ex. Rel. Squire v. Porter, 21 C.2d 45, 129 P.2d 691, cert. den., 318 U.S. 757 (1942)..... | 2 |
| Sullivan v. Shannon, 25 C.A.2d 422, 77 P.2d 498 (1938)..... | 2 |
| Title Co. v. Wilcox Bldg. Corp., 302 U.S. 120 (1937)..... | 10, 12, 14 |
| Trader v. Pope & Talbot, Inc., 190 F.Supp. 282 (E.D. Pa. 1961) | 16 |
| Travelers Insurance Co. v. Workmen's Comp. App. Bd., 68 A.C. 1 (1967) | 13 |
| Van Dusen v. Barraek, 376 U.S. 612 (1964)..... | 16, 18, 19, 20 |
| Woods v. Interstate Realty Co., 337 U.S. 535 (1949)..... | 11 |
| Zellmer v. Aeme Brewing Co., 184 F.2d 940 (9th Cir. 1950).... | 2 |

STATUTES AND CODES

| | |
|--------------------------------------|-------|
| 15 U.S.C.A. §§ 1221-1225 | 2 |
| 28 U.S.C.A. § 1391 | 16 |
| 28 U.S.C.A. § 1404(a) | 2, 16 |
| 28 U.S.C.A. §§ 1406 and 1406(a)..... | 2, 16 |
| 28 U.S.C.A. § 2072 | 9 |
| Calif. Code Civ. Pro. § 337(1)..... | 2 |
| Calif. Rev. & Tax Code § 23302 | 3 |
| Nev. Rev. Stat. § 11.190(1)(a)..... | 3 |
| Nev. Rev. Stat. § 78.015..... | 9 |
| Nev. Rev. Stat. § 78.585..... | 9 |
| Nev. Rev. Stat. § 80.210..... | 8 |

RULES

Pages

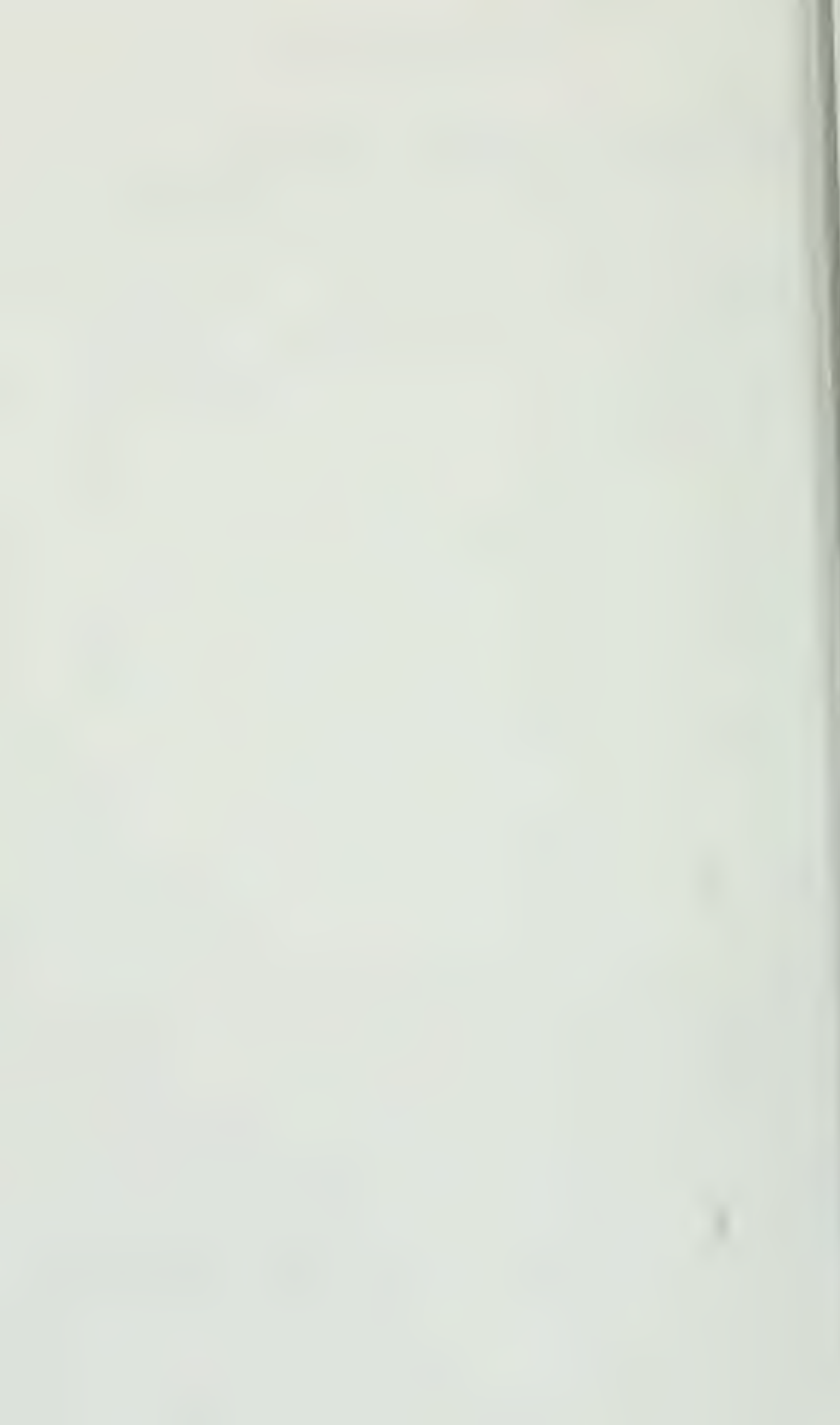
| | |
|---|--------------------------------|
| Federal Rule of Civil Procedure 17(b)..... | 5, 6, 7, 8, 10, 11, 14, 15, 16 |
| Nev. Rev. Stat., Vol. 2, Rule Civ. Pro., 17(b)..... | 8 |

TEXTS

| | |
|---------------------------------|--------|
| 18 Fletcher, Corporations | 10, 11 |
| 3A Moore, Federal Practice..... | 10, 11 |
| 1 Witkin, Procedure..... | 2 |
| 2 Witkin, Procedure | 3 |
| 3 Witkin, Summary | 5 |

MISCELLANEOUS

| | |
|--|----|
| Nev. Rev. Stat. Anno., Code Civ. Pro., Rule 17(b)..... | 8 |
| New Mexico Rev. Stat. Anno., § 21-1-1 (17) (b)..... | 8 |
| Restatement, Conflicts of Law..... | 10 |



In the

United States Court of Appeals

for the Ninth Circuit

LES SCHWIMLEY MOTORS, INC.,

Appellant,

VS.

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Appellees.

Appellees' Brief

On Appeal from the United States District Court
for the District of Nevada

I.

STATEMENT OF THE CASE

A. The proceedings in the United States District Court for the Eastern District of California

The complaint in this action was filed in the United States District Court for the Eastern District of California on November 4, 1966. It alleged that appellant sold De Soto and Plymouth automobiles pursuant to an agreement with appellee Chrysler Motors Corporation dated May 1, 1958 (Comp., 1st C/A, para. VIII, C.T. 3*), and that on November 18, 1960 appellees Chrysler Motors Corporation and Chrysler Corporation discontinued production of De Sotos. (Comp., 1st C/A, paras. XVII, XVIII, C.T. 4-5, O.Br. 2†)

*The Clerk's transcript is referred to in this brief as "C.T.....".

†Appellant's Opening Brief is referred to as "O.Br.....".

It claimed that that discontinuance was wrongful upon several theories, which it set forth in six causes of action.

Appellees moved to dismiss upon the ground that each of those causes of action was time-barred by the relevant California statutes of limitation. (C.T.13) Those statutes were applicable because the Eastern District Court sat in California, California statutes of limitation are applicable to causes of action filed there wherever they may have arisen, and that rule is binding on a federal court sitting in California whose jurisdiction is based on diversity of citizenship. *State of Ohio Ex. Rel. Squire v. Porter*, 21 C.2d 45, 47, 129 P.2d 691, *cert. den.*, 318 U.S. 757 (1942); *Sullivan v. Shannon*, 25 C.A.2d 422, 425, 77 P.2d 498 (1938); 1 Witkin, Procedure, p. 507; *Zellmer v. Acme Brewing Co.*, 184 F.2d 940 (9th Cir. 1950); *Klaxon Co. v. Stentor Co.*, 313 U.S. 487 (1941). The Eastern District Court's jurisdiction was based upon diversity. (O.Br. 1*)

The first cause of action was for breach of a written contract, and the longest applicable California statute, C.C.P. §337 (1), applied to it. Since the alleged breach occurred on November 18, 1960 (C.T. 4-5), and since the complaint was filed on November 4, 1966, almost six years later, it was plainly time-barred. So were the other five causes of action, to which shorter statutes of limitation applied. (C.T. 16-17)

Appellant conceded that that was true (C.T. 29, lines 21-25, p. 34, lines 15-19), and still does. (O.Br. 2, lines 22-25) Its "answer" (O.Br. 2, line 11) was to move to change venue, under 28 U.S.C.A. §§ 1404(a) and 1406(a), to the United States District Court sitting in Nevada. (C.T. 21)

*Appellant's sixth cause of action was based on the Automobile Dealer's Day in Court Act, 15 U.S.C.A. §§ 1221-1225. It was barred by a federal statute of limitations, 15 U.S.C.A. § 1223, and is no longer in the case. See p. 3, below.

The Nevada statute of limitations for breach of written contracts is six years. (Nev. Rev. Stat. §11.190(1)(a))* The complaint was filed about fourteen days before that six-year statute had run. (O.Br. 2, lines 8-10) Appellant said that the Nevada statute would be applicable were the case transferred to the United States District Court sitting in Nevada, and that therefore in that Court its first cause of action would be good by fourteen days. (C.T. 29, 34) Appellant also conceded then, and still does, that the other five of its six causes of action are barred under both California and Nevada law, and they are out of the case. (O.Br. 3, lines 7-11)

Appellant's motion to change venue was filed on February 23, 1967. Appellees opposed the motion upon the ground that Nevada was not the more convenient forum. They also opposed it, and supported their motion to dismiss, on two other grounds (C.T. 59-68): First, that one does not get a change of law along with a change of venue, and that accordingly the same California statute of limitations which barred appellant's sole remaining first cause of action in California would bar it in Nevada after transfer. Second, that appellant California corporation had no capacity to bring the action, much less to change its venue, because its corporate powers had been suspended since 1965 (C.T. 56) by reason of its failure to pay its California franchise taxes since then. Calif. Rev. & Tax Code § 23302; 2 Witkin, California Procedure, p. 1013; *Boyle v. Lakeriew Creamery Co.*, 9 C.2d 16, 68 P.2d 968 (1937).

Oral argument upon appellees' motion to dismiss and upon appellant's motion to change venue was heard on April 24, 1967. (C.T. 73, lines 22-23) Just before that date appellant

*With the exception of those for the recovery of real property or which are further limited by the Commercial Code.

paid its back taxes, and on April 21, 1967 its corporate powers were revived. (C.T. 72) By then, however, the Nevada statute itself had long since run. Since the filing of an action by a California corporation which lacks the capacity to bring it does not toll the statute (pp. 5-6, below), appellees argued that the action was time-barred even under the Nevada statute itself, and that accordingly the court should grant their motion to dismiss even if it considered that Nevada law would apply after transfer.

The Eastern District Court granted appellant's motion to change venue and transferred the action to the Nevada District Court. Its opinion, as appellant puts it, "expressed its belief that the law of the transferee forum should be applied including the Nevada six-year statute of limitations. . . ." (O.Br 3, lines 2-5) It did not rule upon appellees' motion to dismiss. (C.T. 79-84; O.Br. 3, lines 13-15)

B. The proceedings in the Nevada District Court

The Nevada District Court considered it "implicit in the transfer order" that the Eastern District Court had intended the Nevada six-year statute to apply to appellant's first cause of action after transfer, it accepted that implication as "the law of the case," and therefore applied the six-year statute to it. (C.T. 99) However, it granted appellees' motion to dismiss. (C.T. 98-100) This is the reason:

Appellant is a California corporation. At the time it filed this action it lacked the capacity to bring it under California law. (p. 3, above) By the time it paid its taxes and "revived" its capacity, the Nevada statute had run. The fact that the action was filed before the statute had run makes no difference, because (a) the filing of an action

by a California corporation which lacks capacity to maintain it does not toll the statute, and (b) a revivor has no retroactive effect where the statute has run before it is obtained. *Cleveland v. Gore Bros., Inc.*, 14 C.A.2d 681, 58 P.2d 931 (1936); 3 Witkin, Summary, p. 2402. See also, *Ransome-Crummey Co. v. Superior Court*, 188 Cal. 393, 398, 205 Pac. 446 (1922); *Old Fashion Farms v. Hamrick*, 253 A.C.A. 273, 275, 61 Cal.Rep. 254 (1967).

In *Cleveland*, for example, plaintiff corporation's complaint was filed before the statute had run, but it lacked capacity to file it for the same reason appellant in this case did. Subsequently the statute ran. Defendant pleaded limitations. Thereafter plaintiff obtained a revivor. Judgment for defendant was affirmed on this ground:

“That the revivor and restoration of the said corporate rights, privileges and powers of Dome Billiard and Bowling Company, a Corporation, occurred on the 10th day of May, 1934, and did not have retroactive effect in respect to the commencement and prosecution of said action. . . .”*

Those California capacity rules, the Nevada Court held, were binding on a Federal District Court sitting in Nevada, or anywhere else, because under common law conflicts of law rules, and under Federal Rule 17(b), “the capacity of a corporation to sue . . . shall be determined by the law under which it was organized.” (F.R.C.P. 17(b); C.T. 100)

*The reason for the rule is that “it would tend to deprive the statute of its force and encourage a corporation in default to postpone payment of its taxes indefinitely if it were held that by subsequent payment of the delinquent taxes all the benefits of the attempted acts denied to the corporation could be secured.” *Ransome-Crummey Co. v. Superior Court*, above, at 398. *Old Fashion Farms v. Hamrick*, above, at 275.

C. The issues on this appeal

1. The first issue

Appellant concedes (1) that all six of the causes of action alleged in its complaint were barred in the Eastern District of California by the California statutes of limitation which, it concedes, were applicable there (p. 2, above); (2) that the last five of the six are barred whether Nevada or California statutes are applicable to them (p. 3, above); and (3) that the remaining one, the first, is barred even in Nevada, and even if the Nevada statute of limitations is applicable to it, by the California rule that the filing of an action by a California corporation lacking capacity to bring it is a nullity and does not toll the statute, and by Federal Rule 17(b), which makes that California rule applicable in every Federal District Court, including that sitting in Nevada. (O.Br. 4, lines 19-25; 12, lines 22-25)

Appellant's argument is that this Court should simply "disregard" Federal Rule 17(b), and that the District Court should have too (O.Br. 4, lines 19-20); "[i]t is," appellant says, "from the Nevada Court's wooden application of Rule 17(b) which determines that plaintiff's capacity to sue is governed by the law of California that plaintiff has taken this appeal." (O.Br. 3-4)

The first issue, therefore, is whether the District Court and this Court should simply disregard Rule 17(b). The answer to that is, of course, no. (ARGUMENT, PART A, pp. 7-15 below)

2. The second issue

The Nevada District Court felt itself bound to follow the "implication" of the transfer order that the Nevada statute of limitations applied to the first cause of action after transfer. (p. 4, above) The second issue is whether

that statute or the California statute should have been applied after transfer. The answer is that the same California statute which barred this action in California before transfer barred it in Nevada afterwards, because one does not get a change of law along with a change of venue. (ARGUMENT, PART B, pp. 16-20, below) That issue need not be reached, however, unless the court finds the answer to the first issue to be yes.*

II. ARGUMENT

A. FIRST ISSUE: whether Rule 17(b) should be disregarded

Appellant's contention that Rule 17(b) should simply be disregarded is based on two fundamental premises. The first is that the Nevada law is contrary to Rule 17(b) (Part 1, below), and the second is that a federal court has power to disregard that Rule, even if it were contrary to some Nevada law. (Part 2, below) Both those premises are false, and appellant's contention is therefore literally baseless. Appellant's contention also assumes the proposition that enlightened modern conflicts law supports it, which, besides being irrelevant since the contention is baseless anyway (Parts 1 and 2), is entirely wrong. (Part 3, below)

*Appellant says that the Nevada District Court ruled that the Nevada statute applied after transfer, and seems to argue that therefore the issue is closed on appeal. (O.Br. 4) That is certainly not the law. "A successful party in the District Court may sustain its judgment on any ground that finds support in the record." *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *Laughlin v. Eicher*, 145 F.2d 700, 703 (D.C. Cir. 1944), *cert. den.* 325 U.S. 866 (1945); *Commissioner of Internal Revenue v. Stimson Mill Co.*, 137 F.2d 286, 288 (9th Cir. 1943). "When the decision below is correct it must be affirmed by the appellate court though the lower tribunal * * * [may have given] a wrong reason for its actions." *Riley Co. v. Commissioner*, 311 U.S. 55, 59 (1940); *Kithcart v. Metropolitan Life Ins. Co.*, 150 F.2d 997, 1000-1001 (8th Cir. 1945), *cert. den.* 326 U.S. 777 (1945).

1. Rule 17(b) is the same as the Nevada Rule

Rule 17(b) provides that:

“The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized.”*

Appellant’s argument that the Rule should be disregarded is based upon the premise that Nevada law is contrary to it, and that under Nevada law the capacity of a foreign corporation to sue is to be determined by Nevada law. (O.Br. 4-6; 7, lines 12-14; 12, lines 14-17) That premise is false. The Nevada rule is the same, and in fact has the same number, as Federal Rule 17(b). Appellant does not mention it, and apparently has chosen to disregard it, too. It provides:

“The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized, unless a statute of this state provides to the contrary.”
Nev. Rev. Stat., Vol. 2, Rules Civ. Pro., 17(b)†

There is no applicable “statute . . . to the contrary.”‡

*Rule 17(b) also contains provisions relating to the capacity of individuals, personal representatives, partnerships, and others, to sue; those provisions are not relevant to this appeal.

†The Nevada Rule was copied from the New Mexico Rule, which in turn was copied from the Federal Rule, and added “that part following the comma.” (See, New Mex. Rev. Stat. Anno., § 21-1-1 (17)(b), compiler’s note; Nev. Rev. Stat. Anno., 17(b), comment, which respects all of Rule 17(b), including the part relating to personal representatives, etc.)

‡The only Nevada statute “to the contrary” is Nev. Rev. Stat. § 80.210, which restricts, not expands, a foreign corporation’s power to sue. It provides that a foreign corporation which has not complied with Nevada’s doing business rules cannot sue in Nevada. Many states attach the same qualification to the general rule that a corporation’s capacity to sue is governed by the laws of its state of incorporation. Federal Rule 17(b) itself has, by case law, the same qualification attached to it. (p. 11, below) The effect is that a foreign corporation cannot sue in Nevada or other forums having similar laws unless it *both* has capacity to sue under the laws of its state of incorporation *and* has complied with the doing business laws of the forum state. (p 11, below)

Appellant does claim to have found a statute to help it, Nevada Revised Statute § 78.585. (O.Br. 7) It provides that “all corporations . . . whose charter has (sic) been forfeited, shall nevertheless be continued as bodies corporate for the purpose of prosecuting and defending suits . . .” It is more lenient than the California rule made applicable by Rule 17(b), and it might save appellant’s claim if it were applicable to it, but it is not. It appears in Chapter 78 of the Nevada Revised Statutes, which applies to corporations organized in Nevada, only, and it has nothing whatever to do with corporations organized outside Nevada, like appellant. (See Nev. Rev. Stat. § 78.015; see also Chapter 80, which is entitled “Foreign Corporations”)*

2. Rule 17(b) is binding on the Nevada District Court, and on this Court, even if it were contrary to the Nevada Rule

The Federal Rules were promulgated by the Supreme Court pursuant to Act of Congress (48 Stat. 1064, now codified at 28 U.S.C.A. § 2072). Each Rule “has the force of a federal statute,” and, accordingly, each must be applied by every federal court, whether or not the Rule conflicts with a law of the state in which the court sits. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13, *modified*, 312 U.S. 655 (1941); *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438 (1945). There is one exception only. A rule need not be applied if it is invalid because “not within the mandate of Congress to . . . [the Supreme] court,” *Sibbach v. Wilson & Co.*, above, at 7, or because it is unconstitutional. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

*The question whether Nev. Rev. Stat. § 78.585 applied to appellant was presented to the Nevada District Court. The Court held that it did not. (C.T. 99-100) “This Court accords great weight to the determination as to the law of a particular state, made by a district judge sitting in that state.” *State Farm Mutual Automobile Ins. Co. v. Thompson*, 372 F.2d 256, 259 (9th Cir. 1967); *Edwards v. American Home Assurance Company*, 361 F.2d 622, 626-627 (9th Cir. 1966).

Appellant does not contend that Rule 17(b) is invalid upon those or any other grounds. Of course he could not. The Rule has consistently been applied, always upheld, and its validity never doubted. (See, e.g., *R. V. McGinnis Theatres & Pay T.V. v. Video Independent Th.*, 386 F.2d 592 (10th Cir. 1967), *cert. den.*, U.S. (April 1968) (corporate capacity and revivor of it governed by law of state of incorporation); *Sedgwick v. Beasley*, 173 F.2d 918 (D.C. Cir. 1949); *Servits v. McKiernan-Terry Corporation*, 264 F.Supp. 810 (S.D. N.Y. 1966)). Indeed, its promulgation simply continued "the law as previously settled," 18 Fletcher, *Corporations*, § 8612, p. 31; 3A Moore, *Federal Practice*, § 17.21, p. 772, and it "is merely expressive of the general law" followed all over the country. See *Sedgwick v. Beasley*, above, at 919; *Title Co. v. Wilcox Bldg. Corp.*, 302 U.S. 120, 124 (1937); *Glennan v. Lincoln Inv. Corporation*, 110 F.2d 130 (D.C. Cir. 1940) (Maryland corporation suspended by Maryland for the non-payment of taxes cannot sue in D.C. courts); *MacMillan Petroleum Corp. v. Griffin*, 99 C.A.2d 523, 528-529; 222 P.2d 69 (1950); Restatement, *Conflicts of Law*, § 158; 18 Fletcher, *Corporations*, § 8612, p. 31. In *Fidelity Metals Corp. v. Risley*, 77 C.A.2d 377, 381; 175 P.2d 592 (1946), for example, a California court held that a Nevada corporation whose charter had been revoked by Nevada for failure to pay fees and to file papers could not sue in California. It said:

"It appears to be settled law that the effect of the dissolution of a corporation, or its expiration otherwise, depends upon the law of its domicile (Restatement, *Conflict of Laws*, pp. 228-229, § 158; 20 C.J.S., pp. 128-129, §§ 1899, 1900), and that a defunct foreign corporation has no greater capacity or higher standing to commence or maintain an action in the state of

the forum than it would have in the state of its domicile.”*

3. The proposition that enlightened conflicts law supports appellant's contention is wrong

Appellant says that Nevada has “the most significant contacts with the issues of the litigation (O.Br. 4),” and that “progressive courts” (O.Br. 12) follow “the enlightened trend of the conflict of laws that the law of the forum with the most significant contacts with the litigation should be applied to govern that litigation.” (O.Br. 4) According to appellant California corporation, it “was capable” of suing in Nevada when it filed this lawsuit under a Nevada law which is applicable to Nevada corporations only (p. 9, above) (O.Br. 6, lines 20-23, 7, lines 11-13), and it follows that the “progressive” will apply that Nevada capacity law to appellant. (O.Br. 4)

*Appellant claims that one case, *Power City Communications, Inc. v. Calaveras Telephone Co.*, 280 F.Supp. 808 (E.D. Calif. 1968) did disregard Federal Rule 17(b). (O.Br. 10-11) It held that a corporation which had capacity to sue under the laws of its state of incorporation nevertheless could not sue in Federal Court in a diversity case where it had not complied with a licensing statute of the forum state (280 F.Supp. at 812); the statute provided that a corporation which had not complied with it could not sue in the forum's courts. Although the court apparently believed it was breaking new ground with respect to Rule 17(b) (see, O.Br. 11), its holding accorded with law which has been settled for nearly twenty years. See *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949); *Horwitz v. Food Town, Inc.*, 367 F.2d 584 (5th Cir. 1966) (per curiam decision following *Woods*). The rule is that a corporation which lacks capacity to sue under the laws of the state which created it cannot sue in any District Court in any other state; and that even if it does have capacity under the incorporating state's laws, it cannot sue in a District Court in another state if it cannot sue in the courts of the state by reason of its failure to comply with a valid law of the state. See 3A Moore, *Federal Practice*, § 17.01, pp. 3-4; 18 Fletcher, *Corporations*, § 8612, p. 30. In other words, Rule 17(b) creates one hurdle and *Woods* and *Calaveras* another, and a foreign corporation cannot maintain suit unless it gets over both.

That argument is wrong for at least six reasons:

(1) It assumes that Nevada law provides that Nevada capacity rules respecting domestic Nevada corporations also apply to corporations created under another state's laws. But Nevada law provides, just as the general law in effect throughout this country does, that a corporation's capacity to sue is governed by the laws of its state of incorporation. (pp. 8-11, above)

(2) The argument assumes that Nevada has some "policy" (O.Br. 4, lines 21-22) or "interest" (O.Br. 6-7) (which appellant does not identify) in applying its capacity rules respecting domestic Nevada corporations to California corporations.

But Nevada has expressed precisely the contrary interest. Its Supreme Court rules provide that the capacity of a corporation to sue "shall be determined by the law under which it was organized. . . ." (p. 8, above) Indeed, what possible interest might Nevada have in imposing the Nevada rule, upon which appellant relies, that a Nevada corporation in bad standing in Nevada for failure to pay Nevada taxes, can sue, upon a California corporation which is in bad standing in California for failure to pay California taxes, and which therefore under California law cannot sue? Why should Nevada want to permit a California corporation to slip across the border to file a lawsuit for the very purpose of evading the laws of the state which created it, which it has violated, and under which it has no right to file a lawsuit at all?* See, *Title Co. v. Wilcox Building Corp.*, above, at 129.

*Appellant seems to argue that all the relevant events which gave rise to its claim occurred in Nevada. (O.Br. 6-7) It makes no difference whether or not that is true (pp. 13-14, below), but it is not. For example, the contract on which the claim is based was executed in Los Angeles, appellant's president was a California resident at the time, and all business dealings between appellant and appellees was conducted through appellee's Bay Area offices. (C.T. 43)

(3) The argument assumes that Nevada law must be applied “in all its particulars” and California law entirely “rejected,” because Nevada has the greatest number of “significant contacts” with the litigation. (O.Br. 6-7, 12, lines 14-17)

But the “enlightened conflicts” cases upon which appellant relies hold that one should not simply add up all the “contacts” a piece of litigation has with each of two conflicting states, and then apply to the litigation all the law of the state with more contacts and none of the law of the state with less. In *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963) (O.Br. 9), for example, the New York Court of Appeals held that New York law determined whether a New York guest could sue a New York driver who, allegedly, had negligently driven a car in Ontario, but said that Ontario law determined whether the driver had in fact been negligent. The court’s reason was that New York’s interest was paramount with respect to the issue as to whether a New York resident guest ought to be able to sue a New York resident driver, but that Ontario’s interest was paramount with respect to “regulating conduct within its borders. . . .” (*Id.*, at 284)

Accordingly, the test is not, as appellant assumes, which state has more “contacts,” but rather which state has the “more compelling interest in the application of *its law to the legal issue involved*.” (Emphasis added) (191 N.E.2d at 283) Accord, *Travelers Insurance Co. v. Workmen’s Comp. App. Bd.*, 68 A.C. 1, 5-7 (1967) (O.Br. 7)

The “legal issue involved” in this case concerns the capacity of a California corporation. Nevada has no interest in applying capacity rules respecting Nevada corporations to California corporations. (p. 12, above) California has a basic interest in applying its own corporate laws to a Cali-

for California corporation its laws created, in ensuring that a California corporation performs the obligations which it undertook in consideration of California's having created it, and in ensuring that a California corporation does not exercise the powers, like the power to bring a lawsuit, which California gave it and then took away because the corporation violated the law from which the powers came. All the authorities agree that that is so. (See, pp. 9-11, above;* see also p. 5, n., above; *Title Co. v. Wilcox Bldg. Corp.*, above, at 129.

(4) The argument assumes that a court may disregard a statute or a rule, like Federal Rule 17(b), which has the force of a statute, upon the ground that some "significant contacts" analysis indicates that the rule is "not in keeping with the enlightened trend of the conflict of laws." (O.Br. 4)

But a court cannot disregard a statute upon that ground, and a "significant contacts" analysis has no place where a statute sets forth the applicable law. *Mack Trucks, Inc. v. Bendix-Westinghouse Auto. A. B. Co.*, 372 F.2d 18, 20-21 (3rd Cir. 1966), *cert. den.*, 387 U.S. 930 (1967).

(5) The argument assumes that a Federal Court may not only disregard Rule 17(b), which it cannot, but, assuming it could, that it could also fashion a "significant contacts" conflict of laws rule in a diversity case where Nevada, the

*Appellant's contention that it "is a California corporation in name only" (O.Br. 6) is untrue. Appellant was incorporated in California in 1947 (C.T. 55), it did not transact any business in Nevada until 1958 (C.T. 57), and it forfeited its right to do business there in 1965. (C.T. 57) Its president resided in Sacramento, California when the contract on which this claim is based was executed, and he still does. (C.T. 43-44) Moreover, appellant's contention is beside the point, which is that appellant saw fit to obtain its corporate powers from California, and it does not lie in its mouth to claim that it can willy-nilly disregard the laws under which it got those powers.

jurisdiction in which it sits, has a rule exactly like 17(b) and has not indicated any intent to adopt any other rule. A Federal Court cannot do that. *Klaxon Co. v. Stentor Co.*, above, at 487 (diversity court must apply conflicts laws of state in which sits); *Hausman v. Buckley*, 299 F.2d 696, 703-704 (2nd Cir. 1962) *cert. den.*, 369 U.S. 885 (1962) (diversity court may not disregard established law and indulge in "significant contacts" analysis "to speculate about what . . . [the law] will be").*

(6) The argument assumes its own *reductio ad absurdum*. It says:

"This is not a matter of forum shopping. This is a matter concerned with applying the law of the forum with the most significant contacts with the litigation. Under this theory even if the action remained in California, the California court would be required to apply laws of the State of Nevada to this controversy." (O.Br. 12)

In other words, a California court ought to disregard the California corporation law which provides that the filing of an action by a California corporation which has not paid its California taxes, and which is therefore in bad standing in California, is a nullity, and that that California court must instead apply to that California corporation the Nevada rule that the filing of an action by a Nevada corporation which has not paid its Nevada taxes is not a nullity.

Why should a California court do anything so bizarre as that?

*Appellant says *Chenoweth v. Atchison, Topock and Santa Fe Railroad Co.*, 229 F.Supp. 540 (D. Colo. 1964) "made an interest analysis to determine the issue of capacity." (O.Br. 8) Actually, it merely inquired as to what conflicts law was in effect in the state in which the action was brought; the Court considered a diversity court to be bound by the state rule, not free to fashion a different one. Moreover, the case concerned the question as to who was the real party in interest in a wrongful death case, it had nothing to do with capacity (although it mentioned the word), and it certainly had nothing to do with corporate capacity.

B. SECOND ISSUE: whether the same California statute of limitations which barred this action in California barred it in Nevada, too.

Appellant concedes that its claim was time-barred in the California District Court by the California statutes of limitation which were applicable to it there. Its answer in the California court was to move to change venue to Nevada, on the theory that after transfer to Nevada appellant would be entitled to the benefits of the longer Nevada statute of limitations. The California District Court transferred the case to Nevada. The Nevada court believed it "implicit in the transfer order" that the transferor court intended the Nevada statute to apply after transfer, it accepted that as the law of the case, and therefore so held. (pp. 2-4, above) That was error.* The shorter California statute which barred appellant's claim in California barred it in Nevada, too.

Appellant's motion to change venue was made pursuant to 28 U.S.C.A. § 1404(a), which provides that venue may be changed from one proper venue forum to another "for the convenience of witnesses and in the interest of justice."†

*The error was harmless because the Nevada court reached the right result. (PART A, pp. 7-15, above) This Court need not reach that question unless it holds that the Nevada court was wrong with respect to Rule 17(b) (see pp. 6-7, above).

†Appellant's motion was also based upon 28 U.S.C.A. § 1406, which provides for dismissal or transfer where venue in the transferor forum is *improper*. Venue was proper in the California forum, 28 U.S.C.A. § 1391, and § 1406 was therefore inapplicable. See *Van Dusen v. Barrack*, 376 U.S. 612, 634 (1964).

There is some question whether a plaintiff may move to change venue at all. See, e.g., *Trader v. Pope & Talbot, Inc.*, 190 F.Supp. 282 (E.D. Pa. 1961). Some cases have permitted plaintiff to do so, but in unusual circumstances, for example, where defendant could not be served in the transferor district, *Callan v. Lillybelle, Ltd.*, 234 F.Supp. 773 (D. N.J. 1964); *Goldlawr, Inc. v. Herman*, 369 U.S. 463 (1962); or where a similar action was pending between some of the same parties in the transferee court, *Roberts Bros., Inc. v. Kurtz Bros.*, 236 F.Supp. 471 (D. N.J. 1964); or where the venue statute changed while the case was pending. *Pruess v. Udall*, 359 F.2d 615 (D.C. Cir. 1965). Since there are no such circumstances in this case, it is doubtful whether the venue statutes were even available to plaintiff. See *Leyden v. Excello Corp.*, 188 F.Supp. 396 (D. N.J. 1960).

It does not provide that one gets a change of law along with a change of venue, and one clearly does not; the law of the *transferor* forum, including its statutes of limitation, continues to apply, after transfer, in the transferee forum. See *H. L. Green Co. v. MacMahon*, 312 F.2d 650, 653 (2d Cir. 1962), *cert. den.*, 372 U.S. 928 (1963) :

"Although as a matter of federal policy a case may be transferred to a more convenient part of the system, whatever rights the parties have acquired under state laws should be unaffected. . . . The case should remain as it was in all respects but location. . . ."

"The problem of choice of law following transfer under § 1404(a) has arisen most commonly, as it does in part in the case at bar, when a case which for some reason comes within the federal jurisdiction is governed by a state statute of limitations. *Those courts which have considered the problem appear to have been unanimous in their agreement that the statute of limitations of the transferor state should continue to apply. . . .*" (Emphasis added) (Citations omitted)

Accord, Headrick v. Atchison, T. & S. F. Ry. Co., 182 F.2d 305 (10th Cir. 1950) (leading case); *Carr v. American Universal Insurance Co.*, 341 F.2d 220 (6th Cir. 1965); *Exchange Nat. Bank of Olean v. Insurance Co. of North America*, 341 F.2d 673 (2d Cir. 1965), *cert. den.*, 382 U.S. 816 (1965); *Greve v. Gibraltar Enterprises, Inc.*, 85 F.Supp. 410 (D. N.Mex. 1949).

Appellant agreed in the trial court that the transferor's law continues to apply where defendant moves to change venue, but claimed it should not when plaintiff does, and where the statute of limitations in the transferee is longer than that in the transferor. (C.T. 33; *cf.* O.Br. 12) But appellant cannot have it both ways, and several cases have held that an action which is time-barred in the transferor

forum continues to be barred in the forum to which plaintiff moves to transfer it, although it would not be barred under the transferee's statute of limitation. *Hargrove v. Louisville & Nashville R.R. Co.*, 153 F.Supp. 681, 684 (W.D. Ky. 1957):

"Also the clearly stated purpose of Sec. 1404(a) is to authorize a change of venue 'for the convenience of parties and witnesses, in the interest of justice.' It would not appear to be in the interest of justice to so construe Sec. 1404(a) as to permit a plaintiff, having exercised the Sec. 1391(b) right to select his forum, to change that forum with the effect of depriving the defendant of defenses available in that forum. Plaintiffs having chosen their forum are therefore bound by its three-year statute of limitations although they could have elected to file this action in Kentucky where the five-year limitation period exists."

Accord, Bolten v. General Motors Corp., 81 F.Supp. 851 (N.D. Ill. 1949), *reversed on other grounds*, 180 F.2d 379 (7th Cir. 1950), *cert. den.*, 340 U.S. 813 (1950). See also *Quinn v. Simonds Abrasive Co.*, 199 F.2d 416 (3d Cir. 1952), *cert. den.*, 345 U.S. 964 (1953); *Leyden v. Excello Corp.*, above, at 396.

There is no judicial authority the other way, and the Eastern District Court acknowledged that fact. (C.T. 82, lines 14-16) Appellant cites one case (O.Br. 5) only to support its position, *Van Dusen v. Barrack*, above, at 612. There defendant moved to change venue. Plaintiff administrator had capacity to sue in the transferor forum, and resisted the motion upon the ground that he lacked capacity to sue under the laws of the proposed transferee forum. The Supreme Court held that that ground was insufficient, be-

cause the *transferor forum's* laws continued to apply after transfer.* Therefore *Van Dusen's* holding is flatly opposed to appellant's position.

The question as to what law should be applied where plaintiff moves to transfer was not before the *Van Dusen* court, and accordingly the court did not reach it. (376 U.S. at 640) Appellant apparently considers that a ruling in its favor. (O.Br. 5) It should not. All the reasoning in *Van Dusen*, as well as its holding, is dead against appellant:

“ . . . The legislative history of § 1404(a) certainly does not justify the rather startling conclusion that one might ‘get a change of law as a bonus for a change of venue.’ Indeed, an interpretation accepting such a rule would go far to frustrate the remedial purposes of § 1404(a). If a change of law were in the offing, the parties might well regard the section primarily as a forum-shopping instrument. And, more importantly, courts would at least be reluctant to grant transfers, despite considerations of convenience, if to do so might conceivably predjudice the claim of a plaintiff who had initially selected a permissible forum. We believe, therefore, that both the history and purposes of § 1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms

*“Although we deal here with a congressional statute apportioning the business of the federal courts, our interpretation of that statute fully accords with and is supported by the policy underlying *Erie R. Co. v. Tompkins*, 304 U.S. 64.*

*“ . . . What *Erie* and the cases following it have sought was an identity or uniformity between federal and state courts; and the fact that in most instances*

*The case also concerned interpretation of a part of Rule 17(b) which is applicable to an administrator's capacity to sue and is not relevant to this case.

this could be achieved by directing federal courts to apply the laws of the States 'in which they sit' should not obscure that, *in applying the same reasoning to § 1404 (a) the critical identity to be maintained is between the federal district court which decides the case and the courts of the State in which the action was filed.*" 376 U.S. at pp. 635-639. (Emphasis added)

The venue statutes are not intended to permit forum shopping. 376 U.S. at 636; *Roberts Bros. Inc. v. Kurtz Bros.*, 231 F.Supp. 163, 168 (D. N.J. 1964) They are merely "a federal judicial housekeeping measure." 376 U.S. at 636. Their purpose is to ensure that a case may be transferred for trial from one forum to a more convenient one *without affecting the parties' rights at all.* (pp. 17-19, above) It is directly contrary to their purpose to permit them to be used as a vehicle to change the law and therefore the parties' rights.

CONCLUSION

Appellant's claim was time-barred in California, where it was filed, by the California statutes of limitation applicable to it here. Those same California statutes barred it in Nevada, after it was transferred there. The Nevada statute of limitations itself also barred it there, and would have had it been filed in Nevada to start with, because the filing of an action by a California corporation lacking capacity to bring it is a nullity, and that rule follows California corporations wherever they go.

One ought not to get a change of law "as a bonus" for changing venue, because that would subvert the purpose of the venue rules. A corporation ought not to be permitted to acquire a capacity it has lost by failure to comply with the

laws of the state which created it through the device of filing a claim in another state, much less through the device of transferring a claim it filed in a federal court sitting in its own state to a federal court sitting somewhere else.

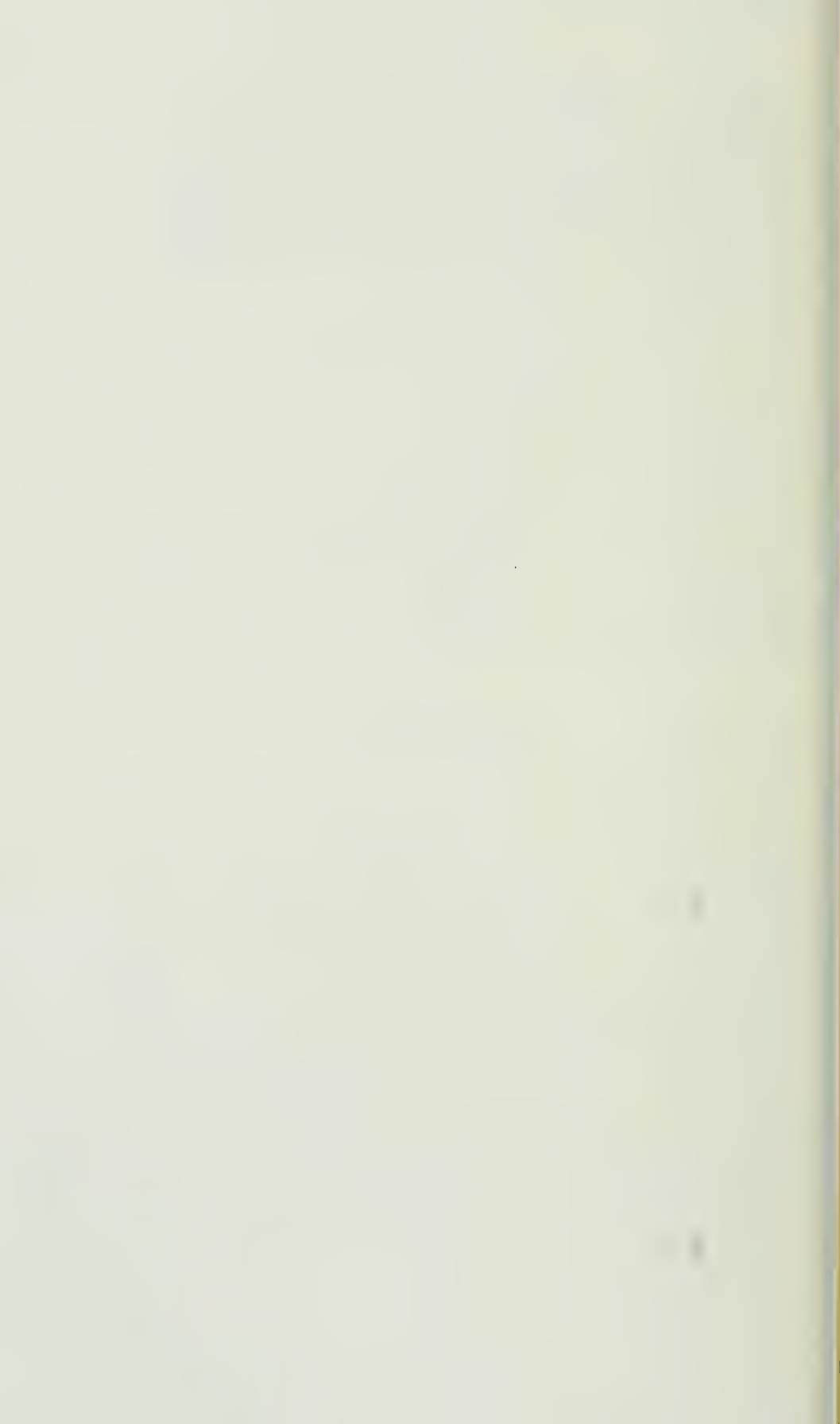
The Nevada District Court's judgment should be affirmed.

Dated: July 12, 1968.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LES SCHWIMLEY MOTORS, INC.,)
)
 Appellant,)
)
 vs.)
)
 CHRYSLER CORPORATION,)
)
 Appellee.)
_____)

No. 22450

APPELLANT'S CLOSING BRIEF

Appeal from Order Dismissing Action by
The Federal District Court
for the
District of Nevada

Honorable Bruce R. Thompson, Judge

FILED

AUG 7 1968

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I N D E X

| | Page |
|---|------|
| <p>I THE FEDERAL DISTRICT COURT SITTING IN NEVADA SHOULD APPLY THE DOMESTIC LAW OF THE LOCAL FORUM TO LITIGATION INVOLVING A FOREIGN CORPORATION DOMICILED IN A LOCAL FORUM WHERE THE FORUM'S INTERESTS IN THE LITIGATION ARE GREAT AND LOCAL POLICY CONSIDERATIONS ARE PARAMOUNT TO THE APPLICATION OF FEDERAL OR STATE CONFLICT OF LAWS RULES</p> | 1 |
| <p>II THE LAW OF THE TRANSFEREE FORUM INCLUDING ITS STATUTE OF LIMITATIONS SHOULD BE APPLIED TO LITIGATION TRANSFERRED INTO ITS PROVINCE WHERE THE TRANSFEREE FORUM HAS THE GREATEST CONTACTS WITH THAT LITIGATION AND THEREBY THE GREATEST INTEREST IN ITS OUTCOME</p> | 4 |

TABLE OF AUTHORITIES CITED

Cases

| | |
|---|---|
| Babcock v. Jackson, 191 N.E.2d, 279 | 3 |
| Bella Vista Investment Company v. Assen, 227 Cal.App. 837 | 3 |
| Pacific Atlantic Line v. Dutcini, 245 P.2d 622, 111 C.A.2d 957 | 4 |
| Power City Communications v. Calaveras Telephone Company, 280 Fed.Sub. 803 | 3 |

Codes

| | |
|--|-------|
| Federal Rules of Civil Procedure 17(b) | 1,2,3 |
|--|-------|

Texts

| | |
|--|---|
| Barron & Holtzoff Vol. 2, Section 485, footnote 8 | 1 |
| West's Annotated Codes Revenue and Taxation Section 23301 | 3 |
| 22 Cal.Jur.2d Foreign Corporations, Section 35, p. 448, 449 | 2 |

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FOR THE NINTH CIRCUIT

Appellee.

APPELLANT'S CLOSING BRIEF

THE HISTORY OF THE

REIGN OF KING CHARLES THE FIRST

BY SAMUEL JOHNSON

LONDON: Printed by A. MILLAR, in Pall-mall.

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THE HISTORY OF THE REIGN OF KING CHARLES THE FIRST, BY SAMUEL JOHNSON, ESQ. IN TWO VOLUMES. THE SECOND VOLUME. LONDON: Printed by A. MILLAR, in Pall-mall. 1719.

For a foreign corporation to establish domicile in the local form it must meet a number of requirements. Three of the most important being that it have properties located in the State; that it transact business in the State; and that it hold its corporate meetings within the State. See 22 Cal.Jur.2d, Foreign Corporations, Section 35, p. 448, 449 (top). The Appellant corporation operating the Plymouth-DeSoto dealership in Reno, Nevada, had all its assets in Nevada, conducted virtually all its business in Nevada, kept all its corporate business records in Nevada, and made its corporate business decisions in Nevada. (The Affidavit in Support of Motion for Change of Venue, transcript of record, pages 23 to 27.) The corporation's only business connection with California was the occasional California resident who traveled to Reno, Nevada, to purchase an automobile from the Appellant. It would be difficult, if not impossible, for anyone to contend that the Appellant corporation was not domiciled in Nevada.

As a domiciliary of Nevada and as a corporation whose business and contacts in general were almost totally Nevada connected, it is apparent that the law of Nevada should apply; and that the Nevada law to apply is that applicable to a domestic corporation. It is clearly the implication of the House Judiciary Hearings on Rule 17(b), which was incorporated intact by the State of Nevada (See Appellee's brief, page 8) that the domicile of a corporation is an important factor in determining the law to be applied to the activities of that corporation.

The only policy consideration preventing the appellant corporation from having capacity to sue is the California desire to give strength to its own taxing codes, as exemplified by the fact that the capacity requirements in question are set forth in the California Revenue and Taxation Code. (See

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West's Annotated Codes, Revenue and Taxation Section 23301) (See also Bella Vista Investment Company vs. Assen, 227 Cal.App. 837) This policy deterrent to Appellant's pursuit of its own cause of action has been satisfied. (Transcript of Record, page 72) As a result, from a pure policy standpoint it becomes a matter of what interest Nevada has in serving. The Nevada Legislature has declared itself in this area (Nevada Revised Statutes, Section 78.585) by saying that all corporations, even where their charter has been suspended, can for purposes of prosecuting or defending a lawsuit continue as a corporate entity.

In Power City Communications v. Calaveras Telephone Company, 280 Fed. Sub. 803 (O.B. pages 10 and 11) the Federal District Court sitting in California applied the law of the local form because it felt the local policy interest to be paramount to Federal Rule 17(b), or the California Conflict of Laws Rule, either of which would have determined capacity by the law of the State of organization of the foreign corporation plaintiff. The court in Power City in effect held that where the contacts with the local form are sufficient to raise considerations regarding local interest and resulting local policy, then that local policy should be adhered to and the domestic law affecting those policies applied. The Court clearly demonstrated itself to be against the automatic application of rules of capacity such as that promulgated in Rule 17(b) of the Federal Rules of Civil Procedure.

Appellant agrees with Appellee that the law to be applied is the law of the State which has the "more compelling interest in the application of its law to the legal issues involved", Babcock v. Jackson, 191 N.E.2d, 279 (Appellee's Brief, page 13). The court here is faced with a situation wherein a corporation in effect domiciled in Nevada, is sued in the Nevada



courts over a contract to be and partially performed in Nevada, and involving a performance affecting generally Nevada citizens. California has only a distant interest in the "legal issue". That being, forcing a corporation organized within its purview to perform its tax obligation. This, in fact, has been accomplished by the Appellant (See Certificate of Revivor, Transcript of Record, page 72), so that any basic policy consideration which connects Appellant with California has in fact been performed*. The fact remains that the legal and factual issues in the case are Nevada connected.

II

THE LAW OF THE TRANSFEREE FORUM INCLUDING ITS STATUTE OF LIMITATIONS SHOULD BE APPLIED TO LITIGATION TRANSFERRED INTO ITS PROVINCE WHERE THE TRANSFEREE FORUM HAS THE GREATEST CONTACTS WITH THAT LITIGATION AND THEREBY THE GREATEST INTEREST IN ITS OUTCOME.

Appellee asserts that the Nevada Court erred in holding the Nevada statute of limitations applied to Appellant's first cause of action following the granting of the Change of Venue from the Federal District Court for the Eastern District of California to the Nevada Federal District Court. Appellant's position on this point has not changed and is set forth in the record presently before the Court. Please refer to (1) the Memorandum of Points and Authority in Support of Motion for Change of Venue, numbers 5, 6, 7, 8, 9, 10 and 11, Transcript of Record, page 29 line 29 through page 35 line 6, (2) Appellant's Supplemental Memorandum in Support of Motion for

*This policy is exemplified by the fact that it is settled law in California that where a corporation discontinues its business and is suspended for failure to pay the minimum franchise tax, it can proceed to trial in an action as long as the tax is paid prior to trial.

Pacific Atlantic Line vs. Dutcini, 245 P.2d 622, 111 C.A.2d 957

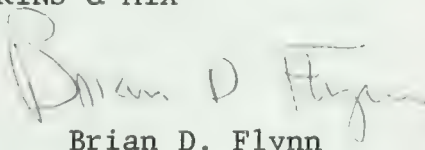


Change of Venue, Transcript of Record page 69 to 70, (3) and the Memorandum and Order issued by Judge Halbert, June 30, 1967, Transcript of Record page 79 to page 84, Opinion published at 270 F. Supp. 418.

Respectfully submitted,

WILKINS & MIX

By

A handwritten signature in dark ink, appearing to read "Brian D. Flynn", is written over the printed name.

Brian D. Flynn

Dated at Sacramento, California
this 6th day of August, 1968.

See also
Vol. for
additional
papers

United States
COURT OF APPEALS
for the Ninth Circuit

Carpenters Local 1273 of the United Brotherhood
of Carpenters and Joiners of America, Construction
General Laborers Local 85, Lane-Coos-Curry-Douglas
Counties Building and Construction Trades Council,
Oregon State Council of the United Brotherhood
of Carpenters and Joiners of America,

Appellants,

v.

Willis A. Hill, doing business as
Willis A. Hill, General Contractor,

Appellee.

APPELLANTS' OPENING BRIEF

*On Appeal from the United States District Court
for the District of Oregon*

PAUL T. BAILEY
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FILED

FEB 8 1968

Attorneys for Appellants **WM. B. LUCK, CLERK**

FEB 8 1968



INDEX

| | Page |
|--|------|
| Jurisdiction | 1 |
| Statement of the Case | 2 |
| Statutes and Court Rules Involved | 4 |
| Questions Presented | 4 |
| Specifications of Error | 5 |
| Summary of Argument | 5 |
| Argument | 7 |
| I. The trial court's findings of fact and conclusions of law fail to meet the re- quirements of Federal Rule of Civil Pro- cedure 52(a) | 7 |
| II. There is no basis in the record for the trial judge's finding and conclusion that appellants' picketing was unlawful | 13 |
| III. There is no basis in the record for the trial judge's award of damages | 17 |
| Conclusion | 18 |
| Appendix A | 21 |
| Appendix B | 23 |

TABLE OF AUTHORITIES

| | Page |
|---|--------|
| Alexander v. Nash-Kelvinator Corp., 261 F.2d 287 (2d Cir. 1958) | 9 |
| American Machine & Metals, Inc. v. DeBothezat Impeller Co., 180 F.2d 342 (2d Cir. 1950).... | 15 |
| Carpenters Local 383 v. NLRB, 323 F.2d 422 (9th Cir. 1963) | 15, 17 |
| Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 80 S. Ct. 1190 (1960)..... | 10 |
| Cuneo v. Carpenters Dist. Council of Essex County & Vicinity, 207 F. Supp. 932 (D.C. N.J. 1962) | 15 |
| Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966)..... | 7 |
| Dwyer v. Socony-Vacuum Oil Co., 276 F.2d 653 (2d Cir. 1960) | 11 |
| Hatahley v. United States, 381 U.S. 173, 76 S. Ct. 745 (1956) | 11 |
| Irish v. United States, 225 F.2d 3 (9th Cir. 1955) | 13 |
| Kelley v. Everglades Drainage Dist., 319 U.S. 415, 63 S. Ct. 1141 (1943) | 9 |
| Kruger v. Purcell, 300 F.2d 830 (3d Cir. 1962) .. | 7, 9 |
| Los Angeles Bldg. and Construction Trades Council, 151 NLRB 83, 1965 CCH NLRB 9191..... | 16 |
| NLRB v. Mountain Pacific Chapter AGC, 270 G.2d 425 (9th Cir. 1959)..... | 16 |
| Newport News, Shipbuilding & Drydock Co. v. United States, 226 F.2d 137 (4th Cir. 1955) .. | 16 |
| Orange Belt Dist. Council v. NLRB, 328 F.2d 534 (D.C. Cir. 1964) | 15 |
| Smith v. Dental Products Co., 168 F.2d 516 (7th Cir. 1948) | 11 |

TABLE OF AUTHORITIES (Cont.)

| | Page |
|--|------|
| United States v. Forness, 125 F.2d 928 (2d Cir. 1942) | 12 |
| United States v. Merz, 306 F.2d 39 (10th Cir. 1962) | 11 |
| Woods Construction Co. v. Pool Construction Co., 312 F.2d 405 (10th Cir. 1963) | 8 |

STATUTES

| | |
|---|--------------------------------------|
| 28 U.S.C. Sec. 1291 | 2 |
| Sec. 2(2), Labor-Management Relations Act, as amended (29 U.S.C. Sec. 152(2)) | 2 |
| Sec. 2(5), Labor-Management Relations Act, as amended (29 U.S.C. Sec. 152(5)) | 2 |
| Sec. 2(6), Labor-Management Relations Act, as amended (29 U.S.C. Sec. 152(6)) | 2 |
| Sec. 2(7), Labor-Management Relations Act, as amended (29 U.S.C. Sec. 152(7)) | 2 |
| Sec. 8(b)(4)(i)(ii)(A), Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(b)(4)(i)(ii)(A)) | 3, 4, 5, 6, 8, 9, 10, 13, 15, 17, 21 |
| Sec. 8(e) Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(e)) | 3, 4, 5, 6, 8, 9, 13, 14, 15, 16, 21 |
| Sec. 303(b), Labor-Management Relations Act, as amended (29 U.S.C. Sec. 187(b)) | 1, 3 |

COURT RULES

| | |
|--|---|
| Rule 52(a), Federal Rules of Civil Procedure | 4, 5, 6, 7, 8, 10, 11, 12, 13, 17, 19, 22 |
| Rule 73, Federal Rules of Civil Procedure | 2 |

United States
COURT OF APPEALS
for the Ninth Circuit

Carpenters Local 1273 of the United Brotherhood
of Carpenters and Joiners of America, Construction
General Laborers Local 85, Lane-Coos-Curry-Douglas
Counties Building and Construction Trades Council,
Oregon State Council of the United Brotherhood
of Carpenters and Joiners of America,

Appellants,

v.

Willis A. Hill, doing business as
Willis A. Hill, General Contractor,

Appellee.

APPELLANTS' OPENING BRIEF

*On Appeal from the United States District Court
for the District of Oregon*

JURISDICTION

This is an appeal from a judgment rendered by
the United States District Court for the District of
Oregon in a suit brought by the plaintiff-appellee
pursuant to Sec. 303(b) of the Labor-Management
Relations Act, as amended (29 U.S.C. Sec. 187(b)).

The plaintiff-appellee is an employer within the meaning of Sec. 2(2) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 152(2)), and engaged in commerce within the meaning of Secs. 2(6) and 2(7) of the Labor-Management Relations Act, as amended (29 U.S.C. Secs. 152(6) and 152(7)) (Cr. 2, 12).¹ The defendant-appellants are labor organizations within the meaning of Sec. 2(5) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 152(5)) (Cr. 2, 12-13). No issue of the District Court's jurisdiction is presented by this appeal.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under 28 U.S.C. Sec. 1291 and Rule 73 of the Federal Rules of Civil Procedure. Notice of Appeal was filed in the time and manner required by law (Cr. 23).

STATEMENT OF THE CASE

Willis A. Hill, the plaintiff-appellee, is a general contractor in the building and construction industry (Tr. 20). At the time in question Hill was engaged in the construction of a book store adjacent to the campus of the University of Oregon at Eugene, Oregon (Tr. 23).

From January 18, 1965 until April 9, 1965 (Tr. 32) the defendant-appellant, Lane-Coos-Curry-Doug-

¹ Tr. refers to Reporter's Transcript. Cr. Refers to Clerk's record of pleadings. SCr. refers to Clerk's supplemental record of pleadings. See Appendix B, *infra*, P. 23 for offer, identification and receipt of exhibits.

las Counties Building and Construction Trades Council, picketed the Eugene construction site for the sole purpose of obtaining Hill's execution of the Oregon State Building and Construction Trades Council Articles of Agreement (Joint Ex. 1) (Tr. 159, 193). The picket sign indicated only that working conditions were less than those enjoyed by labor unions affiliated with the appellant Building and Construction Trades Council (Plt. Ex. 6). The sign expressly stated that no dispute existed with any other contractor on the job site (Plt. Ex. 6).

On February 19, 1965 plaintiff-appellee filed a complaint in the United States District Court for the District of Oregon (Cr. 43) pursuant to Sec. 303(b) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 187 (b)), seeking recovery of alleged damages arising from picketing by the Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council. On August 7, 1967, the trial court ruled that the Oregon State Building and Construction Trades Council Articles of Agreement (Joint Ex. 1) violated Sec. 8(e) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(e)) and therefore picketing to obtain the Agreement violated Sec. 8(b)(4)(i)(ii)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(b)(4)(i)(ii)(A)) (Cr. 12-14). The trial court also assessed damages against the defendant-appellants in the amount of \$11,500 (Cr. 12-14). From that decision defendant-appellants are prosecuting this appeal.

STATUTES AND COURT RULES INVOLVED

The following statutory provisions and court rule (set out in full, Appendix A, *infra*, pp. 21-22) are involved:

Sec. 8(b)(4)(i)(ii)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(b)(4)(i)(ii)(A)).

Sec. 8(e) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(e)).

Rule 52(a), of the Federal Rules of Civil Procedure.

QUESTIONS PRESENTED

Each question presented by this appeal was raised before the United States District Court.

1. Did the trial court's unelaborated statement of ultimate facts and conclusions of law fail to comply with the requirements of Rule 52(a) of the Federal Rules of Civil Procedure?
2. Does the record fail to provide any support for the trial judge's opinion that the Oregon State Building and Construction Trades Council Articles of Agreement (Joint Ex. 1) violated Sec. 8 (e) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158 (e)) and that appellants' picketing violated Sec. 8(b)(4)(i)(ii)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(b)(4)(i)(ii)(A))?

3. Does the record fail to support the trial court's award of damages in the blanket amount of \$11,500?

SPECIFICATIONS OF ERROR

The United States District Court for the District of Oregon erred in the following particulars:

(1) Failing to comply with Rule 52(a) of the Federal Rules of Civil Procedure requiring that in all actions tried upon the facts without a jury the court must find the facts specially and state separately its conclusions of law,

(2) Finding that the Oregon State Building and Construction Trades Council Articles of Agreement (Joint Ex. 1) violated Sec. 8(e) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(e)) and that defendant-appellants picketing violated Sec. 8(b)(4)(i)(ii)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(b)(4)(i)(ii)(A)) when the record of this case fails to provide any basis or support for such a finding,

(3) Awarding to plaintiff-appellee total damages in the blanket sum of \$11,500 when the record does not provide any support for such an award.

SUMMARY OF ARGUMENT

(1) The trial judge's findings of fact and conclusions of law (Cr. 12-14), holding simply that defend-

ants-appellants' picketing was unlawful and that plaintiff-appellee was damaged in the amount of \$11,500 fail to comply with the mandatory requirements of Federal Rule of Civil Procedure 52(a). The trial judge failed to set out any evidentiary basis or facts in the record which would support his ultimate findings and conclusions. Such subsidiary material must be included in a trial court's findings and conclusions to meet the demands of Rule 52(a), particularly in a case such as this where many of the issues are of a highly complex and technical nature.

(2) There is no support in the record for the trial court's decision that the defendants-appellants' picketing was in violation of law. The Oregon State Building and Construction Trades Council Articles of Agreement (Joint Ex. 1) relate solely to matters involved with the contracting and subcontracting of work to be done at a construction site. Such agreements are expressly made lawful by the construction industry proviso to Sec. 8(e) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(e)). Even if the agreement can be considered as open to some other interpretation, there is no evidence in the record that the defendant-appellants intended any interpretation other than application to subcontracting at a job site. Under those circumstances lawful interpretation of the Agreement must be adopted. Therefore, picketing to obtain the Agreement did not violate Sec. 8(b)(4)(i)(ii)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 8(b)(4)(i)(ii)(A)).

(3) There is no support in the record for the trial judge's assessment of damages in the blanket amount of \$11,500. No theory of damages asserted either by the plaintiff-appellee or the defendant-appellants would result in the computation of total damages in that amount. Furthermore, accountants testifying for all the parties to this proceeding asserted that the accrual method of accounting would be the appropriate method for assessing the damages, if any, sustained by the defendant. If damages exist at all, this proper, accrual method would not result in anything approaching the figure assessed by the trial judge.

ARGUMENT

I

The Trial Court's Findings of Fact and Conclusions of Law Fail to Meet the Requirements of Federal Rule of Civil Procedure 52(a).

Rule 52(a) of the Federal Rules of Civil Procedure requires that in all cases tried without a jury, the trial court shall make findings of fact and state separately its conclusions of law based on those facts. The trial judge must make subsidiary findings as to the evidence produced and detailed facts existing in the record, which establish the basis for and reasoning behind the ultimate conclusions he reaches as to the facts and law of each case. *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966); *Kruger v. Purcell*, 300 F.2d 830 (3d Cir. 1962).

The 10th Circuit Court of Appeals clearly defined the requirements of Federal Rule of Civil Procedure 52(a) in *Woods Construction Co. v. Pool Construction Co.*, 312 F.2d 405, 406 (10th Cir. 1963) when it stated:

“A conclusion of ultimate fact without any subsidiary or basic findings of fact upon which such conclusion is based is insufficient compliance with Rule 52(a).”

The *Woods Construction Co.* case also makes it clear this requirement is mandatory on the trial court.

The findings of fact and conclusions of law entered by Judge Belloni in the present case (Cr. 12-14) fail in every respect to meet the standard required by Federal Rule of Civil Procedure 52(a). Aside from statements relating to the district court's jurisdiction and dismissal of one defendant from the case, the only matters set out in the findings and conclusions were (1) that the defendant-appellants had engaged in picketing at the plaintiff's construction job-site to require the plaintiff to execute the Oregon State Building and Construction Trades Council Articles of Agreement; (2) that the agreement violated Sec. 8(e) of the Labor-Management Relations Act (29 U.S.C. Sec. 158(e)), and therefore the picketing violated Sec. 8(b) (4) (i) (ii) (A) of the Labor-Management Relations Act (29 U.S.C. Sec. 158(b) (4) (i) (ii) (A)); and (3) that as a result of the picketing, the plaintiff had been damaged in the amount of \$11,500. No subsidiary findings of

any nature were made in support of or as a basis for these conclusions of ultimate fact and law.

One of the principal reasons for requiring detailed findings of fact and conclusions of law is to give each appellate court an adequate basis for its review of trial court decisions and to preserve to appellants their full right of appeal from such decisions. *Alexander v. Nash-Kelvinator Corp.*, 261 F.2d 287 (2d Cir. 1958). It is neither right nor permissible for an appellate court to review a decision on pure conjecture, *Kruger v. Purcell*, 300 F.2d 830 (3d Cir. 1962) or to search the record in an effort to determine the evidence and facts on which a trial court may have relied. *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 63 S. Ct. 1141 (1943).

Judge Belloni's findings and conclusions do not establish any evidentiary or factual basis in the record for his opinion that the Oregon State Building and Construction Trades Council Articles of Agreement (Joint Ex. 1) violated Sec. 8(e) of the Labor-Management Relations Act as amended (29 U.S.C. Sec. 158 (e)). Neither does he state any support or basis in the record for his conclusion that defendant-appellants' picketing violated Sec. 8((b)(4)(i)(ii)(A) of the Labor-Management Relations Act (29 U.S.C. Sec. 158(b)(4)(i)(ii)(A)) or that resulting damage was caused the plaintiff in the amount of \$11,500. This court has no adequate basis for determining whether or not his decision was in error as regards these matters. While the appellants

will assert at a later point in this brief that such conclusions are in fact erroneous and entirely unsupported by the record, their ability to fully and completely set out argument in opposition to the judge's decision is seriously impaired by their inability to discover and direct their remarks to his reasoning.

In *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 80 S. Ct. 1190 (1960), the Supreme Court ordered further proceedings for additional findings where the trial court had made only the simple and unelaborated statement that a particular transfer of property was a "gift." The court held that such a conclusory and general finding failed to comply with Rule 52. Likewise in the instant case, the trial court's finding that the appellant's picketing was for the purpose of obtaining the defendant's execution of a supposedly unlawful agreement and that such picketing was unlawful under Sec. 8(b)(4)(i)(ii)(A) of the Labor-Management Relations Act (29 U.S.C. Sec. 158(b)(4)(i)(ii)(A)) was general and conclusory and unsupported by any subsidiary findings of fact or conclusions of law. That the findings and conclusions fail to comply with the Federal Rule of Civil Procedure 52(a) is clear.

Judge Belloni's assessment of damages at \$11,500 in a blanket amount particularly violates prevailing case law construing the requirements of Federal Rule of Civil Procedure 52(a). This total award of damages by the trial judge consisted of various detailed items of damage asserted at the trial by the

plaintiff. No attempt was made by Judge Belloni to reflect in his findings and conclusions the various amounts and items of damage utilized in arriving at his total award. On the other hand the United States Supreme Court and Circuit Courts of Appeal have consistently held that where total damages awarded in a given case are made up of several distinct elements the trial court must give a breakdown of the various items it has included in its total award in order to comply with Rule 52(a), *Hatahley v. United States*, 381 U.S. 173, 76 S. Ct. 745 (1956); *Dwyer v. Socony-Vacuum Oil Co.*, 276 F.2d 653 (2d Cir. 1960); *Smith v. Dental Products Co.*, 168 F.2d 516 (7th Cir. 1948). Absent such a breakdown of the elements of damage considered by the trial court, this court has no adequate way of reviewing the validity or legality of the total award. Likewise, the appellants have nothing to which they can direct their argument that the damage award was erroneous, depriving them of their full right of appellate review.

Furthermore, where the issues involved in the assessment of damages are numerous and highly complex, a greater detailing of the items included in an award of damages is required by Rule 52(a) than would ordinarily be necessary. *United States v. Merz*, 306 F.2d 39 (10th Cir. 1962) (dictum) rev'd. on other grounds, 376 U.S. 192, 84 S. Ct. 639 (1964). The award of damages in the present case involved the resolution of extremely complex and highly technical issues, requiring the use of expert testimony

(Tr. 216-248, 261-285) and detailed briefs (SCr. 47-95) by the parties in order to apprise the court of the proper basis for damages. Such a situation clearly calls for a detailed explanation of the total damages awarded. Judge Belloni's failure to offer any explanation for his award does not even approach compliance with Federal Rule of Civil Procedure 52 (a).

In *United States v. Forness*, 125 F.2d 928 (2d Cir. 1942), the court held that fact-finding by trial judges is not only necessary for adequate review of cases by appellate courts but is also important for the purpose of evoking care on the part of trial judges in arriving at the facts of each case. The court in the *Forness* case stated that strong impressions gained from the hearing of evidence will often give way when those impressions are expressed in detail on paper. The court concluded that it is every trial judge's responsibility to exercise this degree of care by supporting his ultimate findings with the evidentiary facts and items on which he has relied. Judge Belloni's findings and conclusions, setting out only his ultimate conclusions as to the issues in the case, fail to meet this required standard of care.

Where findings of fact and conclusions of law prepared by a trial court fail to meet the standards of Federal Rule of Civil Procedure 52(a), this court's duty is clear. This case should be remanded to the trial court for appropriate findings and conclusions as to (1) whether or not the Oregon State Building

and Construction Trades Council Articles of Agreement (Joint Ex. 1) violated Sec. 8(e) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158 (e)); (2) whether or not defendant-appellants' picketing violated Sec. 8(b)(i)(ii)(A) of the Labor-Management Relations Act as amended (29 U.S.C. Sec. 158(b)(4)(i)(ii)(A)); and (3) the assessment of damages allegedly suffered by defendant-appellants. *Irish v. United States*, 225 F.2d 3 (9th Cir. 1955).

II

There is no Basis in the Record for the Trial Judge's Finding and Conclusion that Appellants' Picketing was Unlawful.

Apart from the trial court's failure to comply with Federal Rule of Civil Procedure 52(a), there is no basis in the record for the judge's finding and conclusion that the appellants' picketing violated Sec. 8(b)(4)(i)(ii)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(b)(4)(i)(ii)(A)). In this regard, it should be kept in mind that the trial judge, and quite properly so, refused to receive in evidence Plaintiff's Exs. 1, 2 and 3 (Tr. 11-12). Absent these pleadings and briefs from various National Labor Relations Board proceedings, the record nowhere supports the conclusion that the appellants' picketing was in violation of law.

The Oregon State Building and Construction Trades Council Articles of Agreement (Joint Ex. 1)

provides, in portions pertinent to this case, the following:

“I

This Agreement shall apply to and cover all building and construction work performed by the Employer, Developer and/or Owner-Builder within the jurisdiction of any union affiliated with the Council and the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, repair or demolition of a building, structure or other work.”

“IX

It is further agreed that no employee working under this Agreement need . . . cross any picket line or enter any premises at which there is a picket line authorized by the Council; or any other Building and Construction Trades Council or authorized by any Central Labor Council, or handle, transport or work upon or with any products declared unfair by any of such Councils.”

A fair reading of these provisions of the Agreement can only lead to the conclusion that they apply solely to situations involving work being done at a construction or job-site. The language of the Agreement read in its entirety, as should properly be done, expressly limits its application to job site matters. Therefore, the Agreement comes within the construction industry proviso to Sec. 8(e) of the Labor-Management Relations Act as amended (29 U.S.C. Sec. 158(e), providing that Sec. 8(e) does not apply to labor agreements in the construction industry to

cease doing business with others or handling products in relation to work to be done at a job site (see Appendix A *infra* pp. 21-22). Picketing to obtain such agreements is not a violation of Sec. 8(b)(4)(i)(ii)(A). *Orange Belt Dist. Council v. NLRB*, 328 F.2d 534 (D.C. Cir. 1964); *Carpenters Local 383 v. NLRB*, 323 F.2d 422 (9th Cir. 1963); *Cuneo v. Carpenters Dist. Council of Essex County & Vicinity*, 207 F. Supp. 932 (D.C. N.J. 1962).

Appellee will assert that the language "any picket line" in Article IX of the Agreement (Joint Ex. 1) displays an intent to conduct secondary picketing in violation of the Labor-Management Relations Act which renders the Agreement unlawful under Sec. 8(e) and picketing to obtain it a violation of Sec. 8(b)(4)(i)(ii)(A) (29 U.S.C. Sec. 158 (b)(4)(i)(ii)(A)). Such a contention is utterly without support.

Even if the Agreement is read in this narrow fashion without proper reference to the entirety of its terms, at the very least it is susceptible of several constructions, one of them being that "any picket line" refers to activity primary in nature, confined to construction job sites, and thus lawful under the proviso to Sec. 8(e). It is still susceptible of a lawful construction. Where a contract is subject to interpretation in two ways and, "by one of which it would be lawful and the other unlawful, the former will be adopted." *American Machine & Metals, Inc. v. DeBothezat Impeller Co.*, 180 F.2d 342 (2d Cir. 1950). A construction rendering a contract of doubtful val-

idity is always to be avoided where another valid and reasonable construction can be placed on it. *Newport News, Shipbuilding & Drydock Co. v. United States*, 226 F.2d 137 (4th Cir. 1955).

Since the Agreement (Joint Ex. 1) can reasonably and easily be construed in a valid manner, it is not unlawful in and of itself simply because it does not contain clauses prohibitory of illegal action. *NLRB v. Mountain Pacific Chapter AGC*, 270 F.2d 425 (9th Cir. 1959). Thus, the Agreement cannot, under any theory, be construed by its terms as violative of Sec. 8(e).

The only other theory on which the trial judge could have relied to find the Agreement in violation of Sec. 8(e) would be that the appellants had the intent that its language be applied in some unlawful fashion. The record of this case nowhere indicates such an illegal intent on the part of appellants and it was highly improper for the trial court to read any such intent into the Agreement without evidence to support that conclusion. *Los Angeles Bldg and Construction Trades Council*, 151 NLRB 83, 1965 CCH NLRB 9191.

In summary, the Articles of Agreement (Joint Ex. 1) do not by their terms violate Sec. 8(e) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(e)) and in fact are expressly within the construction industry proviso to Sec. 8(e). There is no evidence or support for a finding that appellants had an illegal intent in seeking execution

of these Articles of Agreement. Therefore, picketing to obtain their execution did not and could not violate Sec. 8(b)(4)(i)(ii)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(b)(4)(i)(ii)(A)). *Carpenters, Local 383 v. NLRB*, 323 F.2d 422 (9th Cir. 1963).

III

There is no Basis in the Record for the Trial Judge's Award of Damages.

The record does not support the trial judge's finding and assessment of damages in the amount of \$11,500. As set out above, Judge Belloni's failure to sufficiently detail the basis for his award of damages in compliance with Federal Rule of Civil Procedure 52(a) makes it impossible for appellants to know in what particulars his thinking on and evaluation of the matter are in error. However, the following is submitted as establishing the fact that under no circumstances will the record support the result reached by the trial court.

In the first place, plaintiff's and defendant's assertions as to damages (see briefs SCr. 47-95) do not, in any combination, total the \$11,500 figure reached by the trial court. This rounded off amount appears to be nothing more than a figure pulled out of the air as being somewhere between the figures contended for by plaintiff and defendants.

In the second place, the entire thrust of the plaintiff-appellee's damage theory was based on a cash

basis method of accounting. (See plaintiff's opening and reply briefs on damages, SCr. 47-59, 79-95). On the other hand, in testimony before the trial court (Tr. 226-231, 261-264) accountants called by both the plaintiff and the defendants agreed that the proper method of accounting in this case would be on an accrual basis. The defendants' answering brief on damages (SCr. 61-78), analyzing the situation on a proper, accrual basis of accounting, makes it clear that the total damages, if any at all, suffered by the plaintiff-appellee do not in any way approach the level awarded by the trial judge.

The testimony and brief on damages are of a highly detailed and technical nature. It would be out of place to set out those entire arguments in this brief. For an analysis of the proper accrual theory for computing any alleged damages see Defendants' Answering Brief, SCr. 61-78, which is a part of this record, and by this reference is incorporated herein. The transcript and that brief clearly point up the trial judge's error in his award of damages. The assessment should not be sustained, and at the very least the matter should be remanded for appropriate determination.

CONCLUSION

For the reasons set forth, it is respectfully submitted that this case be remanded to the trial court with the direction that findings of fact and conclusions of law be entered by the trial judge in confor-

mony with Rule 52(a) of the Federal Rules of Civil Procedure.

In the alternative, if this court does not see fit to remand the case on the above ground, it is respectfully submitted that the trial court's finding that defendant-appellants' picketing was in violation of law be reversed and its assessment of damages be vacated as unsupported by the record or that the case be remanded for a proper assessment of damages, if any, in conformity with the evidence.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL T. BAILEY
Of Attorneys for the Petitioner



APPENDIX A

Statutes and Court Rules Involved

“Sec. 8(b) It shall be an unfair labor practice
 ment Relations Act, as amended (29 U.S.C. Sec. 158
 (b) (4) (i) (ii) (A)) :

Sec. 8(b) It shall be an unfair labor practice
 for a labor organization or its agents

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e).”

Sec. 8(e) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(e)) :

“Sec. 8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other em-

ployer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work:* Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer,' 'any person engaged in commerce or an industry affecting commerce,' and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer,' 'any other employer,' or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided, further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.*" (emphasis added)

Rule 52(a) of the Federal Rules of Civil Procedure:

"In all action tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . ."

APPENDIX B**Exhibits Cited in Appellants' Opening Brief**

| Exhibit | Offered | Identified | Received |
|------------------|---------|------------|----------|
| Joint Exhibit #1 | Tr. 25 | ----- | Tr. 25 |
| Plt. Exhibit #1 | Tr. 33 | ----- | ----- |
| Plt. Exhibit #2 | Tr. 34 | ----- | ----- |
| Plt. Exhibit #3 | Tr. 34 | ----- | ----- |
| Plt. Exhibit #6 | Tr. 247 | ----- | Tr. 247 |

No. 22453

IN THE
UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH J. TYNAN,)
)
Appellant,)
)
vs.)
)
FRANK A. EYMAN, Warden,)
ARIZONA STATE PRISON,)
)
Appellee.)
_____)

APPELLEE'S ANSWERING BRIEF

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The Attorney General of the
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Phoenix, Arizona 85007

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FILED

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Appellant,)
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Attorneys for Appellee

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I N D E X

| | <u>Page</u> |
|---|-------------|
| JURISDICTION | 1 |
| STATEMENT OF THE CASE | 3 |
| SPECIFICATION OF ERRORS | 11 |
| ARGUMENT | |
| I | |
| THE TRANSCRIPT OF THE PRELIMINARY HEARING HAD BEEN REDUCED TO WRITING AND WAS AVAIL- ABLE TO APPELLANT'S COUNSEL AT THE THIRD TRIAL; UNDER THE CIRCUMSTANCES, LACK OF COUNSEL AT THE PRELIMINARY HEARING DID NOT MAKE IT A "CRITICAL STAGE" IN THE PROCEED- INGS AGAINST APPELLANT. | 12 |
| II | |
| THE RECORD SUPPORTS THE FINDING THAT THE PROSECUTOR DID NOT PROCURE AND OFFER PER- JURED TESTIMONY AGAINST THE APPELLANT. | 17 |
| III | |
| ISSUES RAISED FOR THE FIRST TIME ON APPEAL WILL NOT BE CONSIDERED BY THE APPELLATE COURT. | 19 |
| CONCLUSION | 21 |

TABLE OF CASES AND AUTHORITIES

| <u>Case</u> | <u>Page</u> |
|--|-------------|
| Chester v. People of California 355 F.2d 778 (9th Cir. 1966) | 21 |
| Flemings v. Wilson 365 F.2d 267 (9th Cir. 1966) | 20 |
| Gray v. Henderson 354 F.2d 986 (6th Cir. 1965) <u>cert. denied</u> , 383 U.S. 961 (1966) | 16 |
| State v. Hill 88 Ariz. 33 352 P.2d 699 (1960) | 16 |
| Thomason v. Klinger 349 F.2d 940 (9th Cir. 1965) | 21 |
| Tynan v. Eyman 371 F.2d 764 (9th Cir. 1967) | 2, 5, 12 |
| U.S. ex rel. Bloeth v. Denno 313 F.2d 964 (2d Cir. 1963) <u>cert. denied</u> , 372 U.S. 978 (1963) | 17 |

Authorities

| | |
|----------------------------|------|
| United States Constitution | |
| Amendment VI | 2 |
| Amendment XIV | 2 |
| 28 U.S.C.A. § 1291 | 2, 3 |
| 28 U.S.C.A. § 2253 | 2, 3 |
| 28 U.S.C.A. § 2254 | 2 |

NOTE: For convenience, the following abbreviations are used throughout this brief.

The reporter's transcript of the June 30, 1967 hearing before the District Court is designated "R.T."

The transcript of record upon appeal is designated "Record"

The exhibits constituting part of the record on appeal are designated exactly as designated before the District Court.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| JOSEPH J. TYNAN, |) |
| |) |
| Appellant, |) |
| |) |
| vs. |) |
| |) |
| FRANK A. EYMAN, Warden, |) |
| ARIZONA STATE PRISON, |) |
| |) |
| Appellee. |) |

JURISDICTION

Appellant is presently in the custody of the State of Arizona, serving a prison sentence imposed on April 30, 1956, by the Superior Court of the State of Arizona, in and for the County of Maricopa, following conviction by jury of the charges of rape and assault.

On August 4, 1964, appellant filed an application for a writ of habeas corpus in the United States District Court for the District of Arizona (Record at 1). The disposition of this application is not relevant to this appeal.

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On April 15, 1965, the District Court permitted appellant to file in forma pauperis a reapplication for the writ (Record at 16). Presumably, jurisdiction of the District Court was invoked pursuant to 28 U.S.C.A. § 2254; the petition alleges violation of appellant's rights under United States Constitutional Amendments VI and XIV.

On the same date, April 15, 1965, the District Court denied the petition (Record at 23).

The District Court, on August 19, 1965, issued its Order and Certificate of Probable Cause for Appeal (Record at 26). Leave to appeal in forma pauperis was granted by the District Court on January 6, 1966 (Record at 28). This Court had jurisdiction over that appeal under 28 U.S.C.A. §§ 1291 and 2253. Notice of appeal was filed January 17, 1966 (Record at 29).

On January 13, 1967, this Court vacated the April 15, 1965, order of the District Court denying appellant's petition, and remanded the cause to the District Court for further proceedings consistent with the opinion (Record at 40; Tynan v. Eyman, 371 F.2d 764 (9th Cir. 1967)).

Pursuant to this Court's order of January 13, 1967, the District Court held, on June 30, 1967, an evidentiary

hearing on the issues raised in the petition and in this Court's former opinion. On October 4, 1967, the District Court entered its formal order denying the petition for writ of habeas corpus (Record at 44).

The District Court, on October 16, 1967, issued its Certificate of Probable Cause and Order Permitting Appeal in Forma Pauperis (Record at 48). Petitioner's Notice of Appeal was filed October 16, 1967 (Record at 50). Appellant's opening brief was received by appellee on February 1, 1968. This Court has jurisdiction of the appeal by virtue of 28 U.S.C.A. §§ 1291 and 2253.

STATEMENT OF THE CASE

On April 30, 1956, appellant was sentenced by the Superior Court of the State of Arizona, in and for the County of Maricopa, to a term in the state prison following conviction by a jury of the charges of rape and assault.

Prior to the trial which resulted in this conviction, held April 18 and 19, 1956 (hereinafter sometimes referred to as the "third trial"; Defendant's Exhibit C), appellant had been tried twice on the same charges; each of the previous trials resulted in hung juries. The first trial

was held March 7, 1956 (Defendant's Exhibit B). The second trial was held March 28 and 29, 1956 (Defendant's Exhibit B). At each of the three trials appellant was represented by the same court-appointed counsel, Eugene Simon of Phoenix, Arizona (Defendant's Exhibits A, B, C). The transcripts of testimony of these trials were prepared from the reporters' notes just prior to the show cause hearing giving rise to this appeal. Before the three trials enumerated above, on January 10, 1956, appellant was given a preliminary hearing on the charges.

Prior to the petition which ultimately gave rise to this appeal, appellant had made numerous applications for writs of habeas corpus to various courts, both State and Federal. None of these proceedings are relevant here.

This appeal arises from a petition for habeas corpus filed April 15, 1965, alleging that appellant's constitutional rights had been violated because (1) he was denied counsel at his preliminary hearing, and (2) the prosecutor procured and used perjured testimony at the third trial. On the same day, April 15, 1965, the District Court denied the petition without hearing, stating that the preliminary hearing in Arizona is not a critical stage in the pro-

ceedings (Record at 23). Leave to appeal was granted January 6, 1966 (Record at 28).

This Court, in an opinion dated January 13, 1967 (371 F.2d 764; Record at 40), remanded the cause to the District Court for hearing on issues noted in the opinion. This Court, prior to rendering the opinion, received supplemental briefs from appellee State of Arizona on the issue of whether the preliminary hearing is a "critical stage" in Arizona.

This Court's prior opinion directed the District Court to hear evidence on whether a transcript of the victim's testimony at the preliminary hearing was available to appellant's counsel for impeachment purposes and hence whether lack of counsel at the preliminary hearing, under the circumstances, made the preliminary hearing a "critical stage" in the proceedings against appellant. In addition, the cause was remanded to determine whether perjured testimony procured by the prosecutor was used against the appellant.

On June 30, 1967, the District Court held an evidentiary hearing at which the evidence was directed to the issues raised by this Court in its prior opinion, as noted above. The District Court denied the writ and this appeal

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was taken, testing whether the evidence presented to the District Court supports the order denying the petition. The preliminary hearing was reported and transcribed by a certified court reporter and filed in the clerk's office of the Maricopa County Superior Court on January 16, 1956 at 3:23 p.m., becoming part of the record in Cause No. 28279 (Defendant's Exhibit H; R.T. at 2-6). The appellant was not represented by counsel at the preliminary hearing (Defendant's Exhibits G and H; R.T. at 12). The only testimony taken at the preliminary hearing was that of the complaining witness, Fay Groot (Defendant's Exhibits G and H).

The preliminary hearing transcript discloses that the following question was asked of the victim concerning identification:

"Q. Now, I am going to ask you if you have ever seen the defendant here, Mr. Joseph Tynan?

"A. Yes." (Defendant's Exhibit H, at 3).

The transcript discloses that at no time during the preliminary hearing did Fay Groot or anyone else mention that Mrs. Groot's assailant or the appellant did--or did not--have a facial scar (Defendant's Exhibit H; R.T. at 34, 35 and 37).

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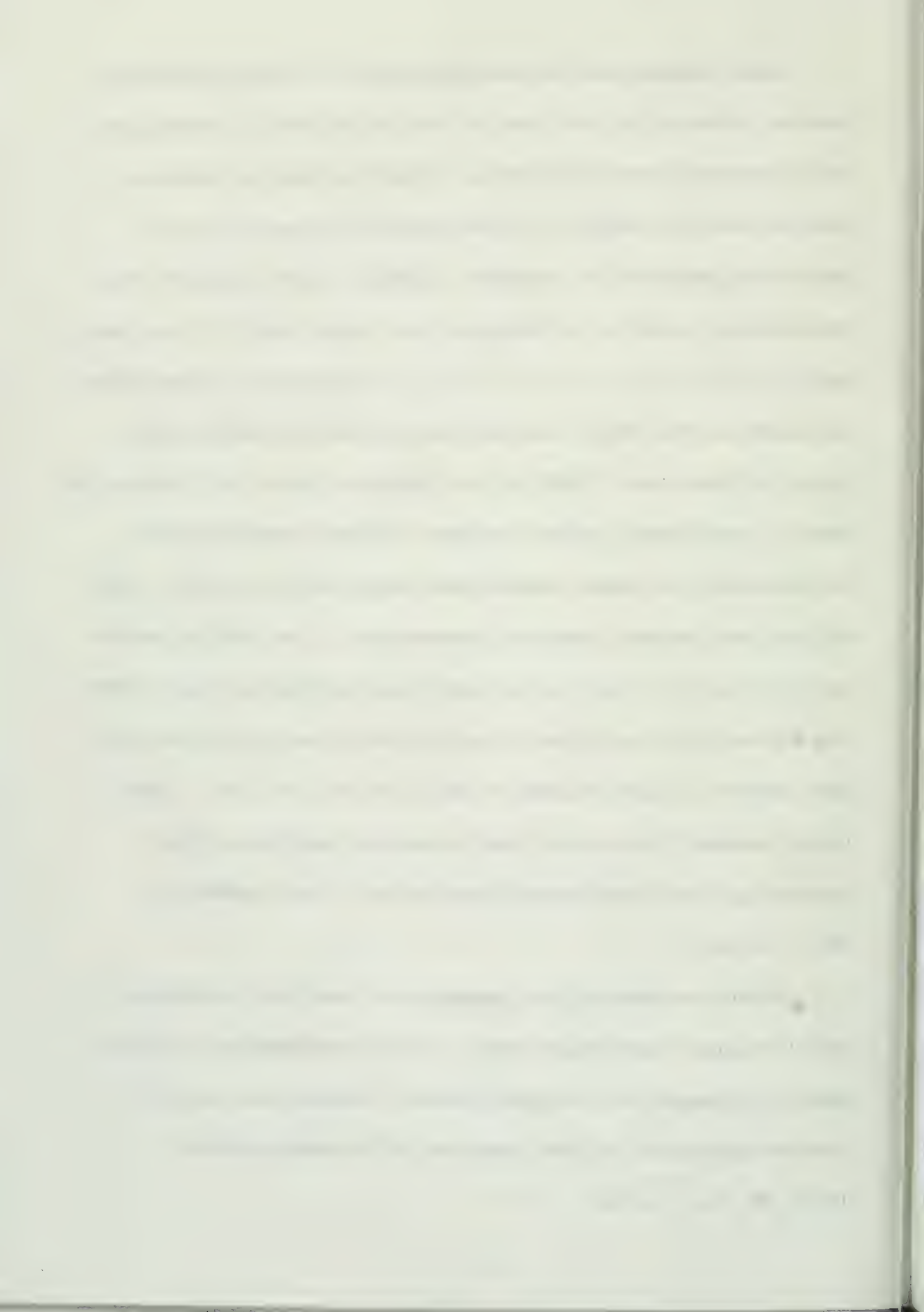
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With respect to the availability of the preliminary hearing transcript for use at the third trial, appellant's trial counsel testified that, though he has no recollection of his procedure in this particular matter, as a matter of practice he checked Superior Court records for preliminary hearing transcripts and read them if they were on file (R.T. at 21, 22, 31, 32). This must be considered in light of the fact that the preliminary hearing transcript in fact was filed in the Superior Court on January 16, 1956. Appellant's trial counsel further testified that he believed the court would have supplied him with a copy of the preliminary hearing transcript if he had requested it (R.T. at 32), but he may not have ordered a copy since the transcript would have been of no value in impeaching Mrs. Groot's identification (R.T. at 34, 35, 36). Also, trial counsel testified that he would have known the transcript was immediately available if he needed it (R.T. at 36).

After reviewing the preliminary hearing transcript, trial counsel testified that, in his professional opinion lack of counsel at the preliminary hearing did not prejudice appellant on the question of identification (R.T. at 35, 36, 42).



Appellant disputes the accuracy and completeness of the preliminary hearing transcript, particularly with respect to the identification testimony of Mrs. Groot (R.T. at 7, 8). However, appellant believes that a Doctor Salas and an investigating officer also testified at the preliminary hearing (R.T. at 9). Appellant's testimony relative to the accuracy of the preliminary hearing transcript is in conflict with the notes of the Justice of the Peace (Defendant's Exhibit H; R.T. at 93, 94), and the testimony of the prosecutor, who believed the transcript to be accurate (R.T. at 47). Appellant testified that his testimony is based purely on memory, and that he made no notes at any time after the preliminary hearing which was held over eleven years earlier (R.T. at 13, 14).

Testimony brought out at the show cause hearing with respect to the issue of subornation of perjury by the prosecutor established the following facts. Officer (now Sergeant) Preston Pettus, whose testimony appellant was relying on to prove this charge, had, at the time of the show cause hearing, no independent recollection of his exact testimony given at the third trial; however, he believes the transcript to be a substantially accurate record of his testimony (R.T. at 73, 74, 76). Sergeant

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Pettus' testimony regarding the conversation between the prosecutor and Mrs. Groot prior to her testimony at the third trial appears in Defendant's Exhibit C at 113-116. The substance of Sergeant Pettus' testimony with respect to the conversation between the prosecutor and Mrs. Groot is as follows:

[By Mr. Simon]

"Q. What was the conversation at that time?

A. The conversation was between Mr. Cracchiolo and Mrs. Groot. It was merely going over some of the facts of what she remembered and what she would testify to.

Q. Was there any reference to a scar on the defendant's face?

A. She, Mrs. Groot, brought up the fact that there was something on Mr. Tynan's face which she described as looking similar to a scar, possibly being some type of a laughing line or some type of a line on his face.

Q. Was that in response to any question by Mr. Cracchiolo whether or not she was positive it was a scar?

A. I believe the original, original thought was hers, bringing up the -- that particular subject.

Q. Did she state whether or not previously she had said it was a scar?

A. She did not say."

(Defendant's Exhibit C,
at 115-116)

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Mr. Cracchiolo, the prosecutor, testified as to the substance of his conversation with Mrs. Groot prior to the third trial (R.T. at 51-54, 63-66). Mr. Cracchiolo specifically denied suggesting to Mrs. Groot that she should avoid describing the defendant as having a scar (R.T. at 53-54, 64). The prosecutor further testified that he did not feel Mrs. Groot had been definitive in the first two trials on whether the defendant had a scar. (R.T. at 65), that he did not attribute the importance that Mr. Simon did to the testimony about a scar (R.T. at 64-65), and that even taking Mrs. Groot's testimony on the scar in its worst light, the positiveness of her identification was not shaken:

[By Mr. Pierson]

"Q. Just a couple of questions. Mr. Cracchiolo, taking Mrs. Groot's testimony of the scar or no scar in its worst possible light for the prosecution, in your opinion did this affect the positiveness or would this affect the positiveness of her identification of Mr. Tynan?

A. Not one bit.

Q. Upon what do you base this?

A. I base it on an intimate knowledge of the witness. I saw her four times testify. I know I had to see her four times prior

to testifying and I will never forget her as long as I live. She was absolutely terrified of this gentleman every time she saw him. She was absolutely terrified."

(R.T. at 68-69).

Mr. Cracchiolo further testified that the discrepancies in Mrs. Groot's testimony were normal, especially in light of the time span involved (R.T. at 69-70).

Official records of the Phoenix Police Department show that appellant was identified on Department records as having a facial scar (R.T. at 80-84; Defendant's Exhibits I-1 through I-6).

SPECIFICATION OF ERRORS

Although appellant's brief contains no Specification of Errors, appellee believes appellant is raising the following points:

1. The District Court erred in finding that, on the facts of this case, the preliminary hearing was not a "critical stage" in the proceedings against appellant and that, therefore, lack of counsel at the preliminary hearing was not a denial of due process.

2. The District Court erred in finding that the transcript of the preliminary hearing was available to

the appellant's counsel at the third trial.

3. The District Court erred in finding, on the evidence before it, that there is no merit in the assertion that perjured testimony was procured by the prosecutor.

In addition, appellant raises several other points not considered by the District Court and not raised in the Petition for Writ of Habeas Corpus.

ARGUMENT

I

THE TRANSCRIPT OF THE PRELIMINARY HEARING HAD BEEN REDUCED TO WRITING AND WAS AVAILABLE TO APPELLANT'S COUNSEL AT THE THIRD TRIAL; UNDER THE CIRCUMSTANCES, LACK OF COUNSEL AT THE PRELIMINARY HEARING DID NOT MAKE IT A "CRITICAL STAGE" IN THE PROCEEDINGS AGAINST APPELLANT.

This Court's prior opinion in this matter (371 F.2d 764) makes it quite clear that in determining whether the preliminary hearing was a "critical stage" in the proceedings against the appellant, the primary question is whether a transcript of the victim's testimony at the preliminary hearing was available for use by defendant's counsel, for impeachment purposes, at the third trial.

The appellee submits that the evidence adduced at the June 30, 1967, hearing before the District Court

shows conclusively that, under the circumstances of this case, the preliminary hearing was not a critical stage in the proceedings against the appellant.

First of all, it has been conclusively established that the preliminary hearing proceedings were reported by a certified court reporter, that the reporter transcribed, or caused to be transcribed, his notes, and that the reporter's transcript of the preliminary hearing proceedings were filed in the Superior Court Clerk's office on January 16, 1956, and thus would have been available at any time after that for use by the appellant's counsel. The appellant's opening brief discloses that his copy of the preliminary hearing transcript was made from a copy in possession of the appellee, and therefore does not bear the stamp of the Clerk of Superior Court indicating that the transcript in fact was filed on January 16, 1956; appellant's arguments on whether the transcript was filed are therefore based on an erroneous premise.

The testimony of Mr. Eugene Simon, appellant's trial counsel, together with the hearing transcript itself, makes it quite clear, contrary to appellant's

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recollection, that Mrs. Groot gave no testimony at the preliminary hearing concerning a scar. Furthermore, the hearing transcript would have been, in Mr. Simon's professional opinion, of no help for impeachment at the third trial. Mr. Simon further concluded that appellant was not prejudiced by lack of counsel at the preliminary hearing, at least as to the identification issue. It seems clear from Mr. Simon's testimony that he undoubtedly had perused the preliminary hearing transcript but had found it of no value, and therefore had not requested a copy of it.

Appellee submits that the record itself with respect to the preliminary hearing transcript, and the observations of appellant's trial counsel, Mr. Simon, makes it quite evident that the transcript of the preliminary hearing was available for impeachment purposes, but that it was of no value for impeachment, and that lack of counsel at the preliminary hearing was not prejudicial to the appellant.

Appellant disputed the completeness and accuracy of the transcript of the preliminary hearing, and even disputed the accuracy of the notes of the Justice of the

Peace, which tended to verify the correctness of the transcript itself. Appellant's petition, his testimony at the show cause hearing, and his opening brief do in fact indicate that his recollections of what transpired at the preliminary hearing differ greatly from the records and the recollections of others. Appellee believes that the fact that the appellant steadfastly maintained that more witnesses than Mrs. Groot actually testified at the preliminary hearing (despite the reporter's transcript, the Justice of the Peace's notes, and Mr. Cracchiolo's testimony to the contrary), thoroughly discredits his recollection of what transpired over eleven years earlier at that hearing. And if the appellant is confused about how many people testified at the hearing, it is more than likely that he is also mistaken as to the substance of Mrs. Groot's testimony. With eleven years of confinement in which to brood over the "injustice" done to him, it is not unlikely that truth became mixed with wishful thinking--especially since appellant admittedly had no notes or record of what transpired at the preliminary hearing. Weighing against appellant's vague recollections, possibly confused with wishful thinking, is the



reporter's transcript, which was certified by a certified court reporter, and which became an official record of the Superior Court. The Supreme Court of Arizona, in State v. Hill, 88 Ariz. 33, 39, 352 P.2d 699, 703 (1960), noted the strong presumption as to accuracy to be given to transcripts of official court reporters:

"Official court reporters are appointed by the judges of the Superior Courts, A.R.S. § 12-221, and as such they are judicial employees. By reason of their official position, a strong implication attaches to their transcripts of testimony that they are accurate and truthful."

In addition to this presumption, the District Court had an opportunity to observe Mr. Tynan's demeanor as he testified on this and other points, and presumably took into consideration his denial of the accuracy of the Justice of the Peace's own records which corroborate the transcript. And in addition, the prosecutor, Mr. Cracchiolo, also corroborated the transcript. Findings of Fact by a District Judge on habeas corpus petition will not be set aside unless clearly erroneous, and due consideration will be given to the District Court's determination of the credibility of the witnesses.

Gray v. Henderson, 354 F.2d 986 (6th Cir. 1965), cert.

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denied, 383 U.S. 961 (1966); U.S. ex rel. Bloeth v. Denno, 313 F.2d 964 (2d Cir. 1963), cert. denied, 372 U.S. 978 (1963).

For the reasons stated, the appellee believes the issues raised by this Court in its prior opinion have been answered by the evidence below in such a manner as to compel a finding that in this case the preliminary hearing was not a "critical stage" in the proceedings against the appellant.

ARGUMENT

II

THE RECORD SUPPORTS THE FINDING THAT
THE PROSECUTOR DID NOT PROCURE AND
OFFER PERJURED TESTIMONY AGAINST THE
APPELLANT.

The evidence below shows that appellant has failed completely to substantiate his charge that perjured testimony procured by the prosecutor was used in the third trial, resulting in conviction.

Sergeant Preston Pettus' testimony at the third trial regarding the conversation he overheard between the prosecutor and Mrs. Groot (a portion of which is set out in the Statement of the Case, supra) is no proof what-

ever of the charge. Indeed, Pettus testified that it was Mrs. Groot, not Mr. Cracchiolo who brought up the issue of whether there was a scar or not. Additionally, Mr. Cracchiolo, the prosecutor, flatly denied the charges, and the District Court had an opportunity to observe his demeanor, as well as that of appellant. In sum, there is no testimony to contradict the prosecutor's denial that perjury was suborned. An examination of the record leads one to the conclusion that the prosecutor himself came to: the variations in the victim's testimony were not abnormal and Mrs. Groot's testimony in the first two trials had not been definitive as to whether the defendant had a scar or not. It is clear from Mr. Cracchiolo's testimony, that the prosecution did not consider the scar testimony as important as did the defense. Finally, Mr. Cracchiolo testified flatly that however Mrs. Groot's testimony about the scar is viewed, her identification of the appellant as her assailant was positive. The appellee submits the evidence fully supports the District Judge's finding that there was no merit in the assertion by the petitioner that perjured testimony was produced by the prosecutor.

Additionally, the records of the Phoenix Police Department show that officers trained in making identification themselves, as part of their official records, listed Mr. Tynan as having a scar on his right cheek. Certainly, these records at least create a reasonable basis for assuming that whether appellant had a scar or not was a matter of opinion. In this light, Mrs. Groot might well be forgiven her apparent uncertainty as to the scar. Clearly, she at no time harbored any doubt that appellant was her assailant.

In addition to the foregoing, Mr. Simon's testimony makes it quite apparent that any discrepancy between Mrs. Groot's testimony at the first and second, as opposed to the third, trial was fully brought out by counsel for the benefit of the jury and the trial judge.

ARGUMENT

III

ISSUES RAISED FOR THE FIRST TIME ON
APPEAL WILL NOT BE CONSIDERED BY THE
APPELLATE COURT.

In addition to the points previously covered, appellant, for the first time in his opening brief, raised issues of the sufficiency of the lineup identification

by the plaintiff; the correctness of the arrest record; the fact that he was questioned by Phoenix Police detectives enroute from Los Angeles to Phoenix without having been advised of his right to remain silent; that he was not taken before a Justice of the Peace until December 31, 1955, despite the fact that he arrived in Phoenix in custody on December 28, 1955; that the prosecutor led the witness at the preliminary hearing; that the Justice of the Peace did not inform him of his right to make a statement not under oath at the preliminary hearing; and that the prosecutor improperly used his power of suggestion on the Justice of the Peace in requesting that the bond be increased. Although each of these issues is vulnerable to one or more arguments on its merits, appellee believes the rule is clear that on an appeal from a lower court denial of a petition for habeas corpus, the Court of Appeals will not consider those grounds for relief which appellant asserted for the first time in his notice of appeal and in his briefs filed in the Court of Appeals. Flemings v. Wilson, 365 F.2d 267 (9th Cir. 1966). Certainly none of the issues enumerated, even if proved, manifest a miscarriage of justice which might modify



the foregoing rule. See Chester v. People of California,
355 F.2d 778 (9th Cir. 1966); Thomason v. Klinger, 349
F.2d 940 (9th Cir. 1965).

CONCLUSION

There is ample evidence to support the findings of
the District Court on the issues remanded to it. The
decision of the District Court should be affirmed.

Respectfully submitted,

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The Attorney General

CHARLES S. PIERSON

CHARLES S. PIERSON
Assistant Attorney General

Attorneys for Appellee

THE UNIVERSITY OF CHICAGO
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CHICAGO, ILL. 60637

MEMORANDUM

TO : DIRECTOR, DIVISION OF THE PHYSICAL SCIENCES
FROM : [Name]
SUBJECT: [Topic]
[Detailed text of the memorandum follows, including a summary of the work and any recommendations.]

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

CHARLES S. PIERSON, being first duly sworn upon oath,
deposes and says:

I certify that, in connection with the preparation
of this brief, I have examined Rules 18, 19 and 39 of the
United States Court of Appeals for the Ninth Circuit, and
that, in my opinion, the foregoing brief is in full com-
pliance with those rules.

CHARLES S. PIERSON

CHARLES S. PIERSON

Subscribed and sworn to before me this 1st day of
~~February~~ March, 1968.

18/ Connie Rae Loughlin
Notary Public

My Commission Expires:

April 21, 1969

Copy mailed this 1st day of
~~February~~ March, 1968, to:

Joseph J. Tynan, #18933
Arizona State Prison
Florence, Arizona

By CHARLES S. PIERSON
CHARLES S. PIERSON

UNITED STATES DEPARTMENT OF COMMERCE

WASHINGTON, D. C.

REPORT OF THE
COMMISSIONER OF THE
BUREAU OF THE
CENSUS
FOR THE YEAR
1900

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROMAN LUGO RODRIGUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FEB 24 1969

FILED

JAN 6 1969

WM. B. LUCK CLERK

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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TOPICAL INDEX

| | <u>Page</u> |
|--|-------------|
| Table of Authorities | ii |
| STATEMENT OF JURISDICTION AND PROCEEDINGS | 1 |
| STATEMENT OF THE EVIDENCE | 3 |
| ARGUMENT | 11 |
| I THE EVIDENCE WAS PROPERLY ADMITTED AND IS SUFFICIENT TO SUSTAIN THE CONVICTION. | 11 |
| CONCLUSION | 16 |

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page</u> |
|---|-------------|
| Braatelian v. United States, 147 F. 2d 888 (8th Cir. 1945) | 16 |
| Cellino v. United States, 276 F. 2d 941 (9th Cir. 1960) | 12 |
| Eason v. United States, 281 F. 2d 818 (9th Cir. 1960) | 12 |
| United States v. Gypsum Co. , 333 U. S. 364 (1947) | 12, 14 |

Statutes

| | |
|------------------------|-------|
| 18 U. S. C. , §2 | 11 |
| 18 U. S. C. , §1291 | 1 |
| 18 U. S. C. , §1294 | 1 |
| 21 U. S. C. , §174 | 1, 11 |
| 26 U. S. C. , §4705(a) | 1 |

Texts

| | |
|---|----|
| 16 Am. Jur. 2d 147, Conspiracy, §38 | 16 |
| 29 Am. Jur. 2d 692, Evidence, §638 | 13 |
| IV Wigmore on Evidence (3rd ed.) 79, §1072 | 13 |

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROMAN LUGO RODRIGUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

STATEMENT OF JURISDICTION
AND PROCEEDINGS

This is an appeal by the defendant Rodriguez, pursuant to 18 U.S.C. §§1291, 1294 from a conviction for violations of 21 U.S.C. §174 and 26 U.S.C. §4705(a).

On January 11, 1967 the United States Grand Jury for the Central District of California returned a nine count indictment charging the defendant and two others, Andrew Aguilar and Aurora Contreras Aguilar, with violations of federal narcotics statutes. The defendant was charged only in Counts Seven, Eight and Nine as follows:

In Count Seven, with unlawfully receiving, concealing and

facilitating the concealment and transportation of a quantity of illegally imported heroin; in Count Eight with unlawfully selling and facilitating the sale of this same heroin to Agent Edward A. Heath of the Federal Bureau of Narcotics; and in Count Nine, with unlawfully selling this same heroin to Agent Edward A. Heath without obtaining a written order on a form issued for that purpose (C. T. 2-10).^{1/}

On March 3, 1967 the defendant waived a trial by jury and special findings of fact (C. T. 20, 21).

On March 9, 1967, the trial commenced before the Honorable John W. Delehant. The trial was concluded the same day and the court found the defendant guilty as charged in Counts Seven, Eight and Nine (C. T. 22). On March 16, 1967, the defendant was sentenced to concurrent five year terms of imprisonment on Counts Seven, Eight and Nine. The defendant moved for a judgment of acquittal and the court denied the motion (C. T. 23, 24).

On March 16, 1967, the defendant filed a Notice of Appeal herein (C. T. 28).

On about October 17, 1968 the defendant's court appointed counsel, Willis Peck, filed a "Supplemental Brief in Support of Motion to Withdraw as Court Appointed Counsel on Appeal". On October 29, 1968, this court relieved Willis I. Peck of his appointment to represent appellant. This brief is filed in response

^{1/} "C. T. " refers to Clerk's Transcript.

to a letter from the Clerk of the United States Court of Appeals for the Ninth Circuit, dated December 5, 1968, requesting an answering brief be filed to the brief submitted by Mr. Peck.

STATEMENT OF THE EVIDENCE

Albert E. Marmolejo,^{2/} a Government informer, testified (R.T. 28, 29).^{3/} Andrew phoned him about 10:00 a.m. on December 17, 1966 and said that he had received a call from Mexico that the heroin was on the way. He went to Andrew's house only once on December 17, 1966 in the evening (R.T. 58-60). Ten persons were present when he arrived including Andrew's common-law wife, her four children, defendant Rodriguez's wife and three or four children, and Aurora and her two children. Defendant Rodriguez was present, but they were not introduced. Andrew was not there. Marmolejo was not told he would have to leave. He and Andrew's wife had a short conversation and he sat down to wait for Andrew (R.T. 44, 45, 58-60). Five minutes later Andrew arrived. Defendant Rodriguez walked toward Andrew and Marmolejo got up. Andrew introduced Marmolejo to defendant Rodriguez saying, "This is the guy that

^{2/} In this brief, the following abbreviations are used: co-defendant Aurora Contreras Aguilar is "Aurora", co-defendant Andrew Aguilar is "Andrew", witness Albert E. Marmolejo is "Marmolejo", and appellant Roman Lugo Rodriguez is "defendant Rodriguez" or "defendant".

^{3/} "R. T. " refers to Reporter's Transcript.

brought the stuff from T.J. " Are you sure that the deal is going to go down tonight? Marmolejo replied, yes he was pretty sure it would (R. T. 30-34, 45-46). This conversation was in English (R. T. 46-47). Andrew did not tell Marmolejo to leave or say that Marmolejo was unwelcome when Andrew was not around (R. T. 58-60).

On Andrew's instruction, Andrew, Marmolejo and defendant Rodriguez went into the bedroom. Defendant Rodriguez produced a cellophane wrapped package containing eight balloons which he handed to Andrew (R. T. 34, 35, 38, 47, 48). The conversations in the bedroom with defendant Rodriguez were in Spanish (R. T. 49, 50). Andrew said that defendant Rodriguez had just arrived from Mexico with the heroin for the sale that was to take place that evening (R. T. 30). Andrew opened the package and took out a small quantity of heroin. Rodriguez asked what Andrew was going to do with the heroin, and said it was pure. Andrew said he was going to take some and see how good it was (R. T. 35, 36, 49, 50). Andrew left the bedroom while defendant Rodriguez and Marmolejo stayed behind (R. T. 36). Defendant Rodriguez asked Marmolejo if Marmolejo had the money for the purchase. Marmolejo replied that he did not but that the sale would take place that evening. Defendant Rodriguez asked about the money a couple of other times and said that he could not allow the heroin out of his sight, that when the transaction occurred, it would have to take place in his presence. Defendant Rodriguez asked if Marjolejo was the buyer, and Marmolejo said he was not

(R. T. 37, 50-53). Andrew returned to the bedroom and said that the heroin was pure. Andrew removed another quantity, and in response to defendant Rodriguez's question, Andrew said this was for his part in setting up the sale (R. T. 37).

As they all left the bedroom defendant Rodriguez said that he had to know what was going on when the buy was going to be made, that he could at no time let the heroin out of his sight, and that he had to have the money before he could let the heroin out of his possession (R. T. 37). Defendant Rodriguez retained possession of the bulk of the heroin (R. T. 38). The conversation ended and Marmolejo then left the residence (R. T. 37).

Arrangements were made for the sale to take place that evening at the Montebello bowl (R. T. 39, 40).

That evening, about 10:00 p.m., he saw defendant Rodriguez, Andrew, and Aurora arrive at the Montebello bowl in a Ford driven by defendant Rodriguez. He went to the car and spoke to Andrew and Aurora. He asked Andrew if he had the heroin. Andrew said yes and asked if Marmolejo had the money. Marmolejo said they did. Andrew asked if Marmolejo had the money on him and Marmolejo said no, that Agent Heath was going to make the buy. At that time Agent Heath was standing fifteen or twenty yards in front of the car. Marmolejo was on the passenger side. Defendant Rodriguez then asked if Marmolejo had the money and Marmolejo said no, that the buy had to be made through Heath. Defendant Rodriguez then asked if Heath could come to the car so the buy could be made. Andrew said this could not be done because

Andrew and Heath had had a misunderstanding on an earlier occasion, and that Aurora was with them so she could make the buy with Heath. Defendant Rodriguez said he couldn't let the heroin out of his sight. Andrew said that the transaction would take place in front of the car where they could see the money and the heroin change hands. Aurora left the car. Defendant Rodriguez handed the heroin to Andrew and Andrew handed it to Aurora. Aurora and Marmolejo then walked over to Heath and Aurora handed Heath the heroin. Heath put it on the hood of the car and opened the package and looked at it. At that time the arrests were made (R. T. 41-43, 53-55, 65).

On cross-examination, Marmolejo specifically denied being at Andrew's house more than once on December 17, 1966, and he denied going for a fix on that afternoon with Andrew and Aurora (R. T. 58-60).

Edward A. Heath, a federal narcotics agent, testified that he arrested defendant Rodriguez on December 17, 1966 at about 10:00 p. m. in the parking lot of the Montebello bowling alley (R. T. 11, 12). Before the arrest he saw defendant Rodriguez in the company of Andrew and Aurora. Other narcotics agents and Marmolejo were also present (R. T. 12). Defendant Rodriguez arrived at the parking lot, driving a 1958 red and white Ford, with Andrew and Aurora as passengers (R. T. 13). Defendant Rodriguez parked the Ford, and Marmolejo and Heath walked towards it. Heath stopped about twenty yards away and Marmolejo walked to the Ford and spoke with the occupants (R. T. 13).

Defendant Rodriguez and Andrew remained in the automobile and Aurora left the car (R. T. 27, 28). Marmolejo and Aurora then returned to Heath where Aurora and Heath negotiated the sale of eight ounces of heroin for \$1600 (R. T. 13). Aurora then handed Heath a package which contained 162.1 grams of heroin (R. T. 13). Neither Aurora nor anyone else asked Heath for a written order form (R. T. 62). Aurora, Andrew and defendant Rodriguez then were arrested (R. T. 14).

Neither defendant Rodriguez, Andrew nor Aurora asked Marmolejo for an order form pertaining to the heroin. He neither gave them one nor received one from them (R. T. 61).

The package received by Heath from Aurora was identified by Marmolejo as the same one that Marmolejo saw defendant Rodriguez give Andrew at Andrew's house. A field test showed the package contained an opium derivative, and the chemist identified the substance as heroin (R. T. 14-27, 34, 35, 63-64).

The Government rested (R. T. 64).

Aurora, a defense witness, gave conflicting testimony. She arrived at Andrew's house at about 11:00 a. m. on December 17, 1968. She was at the house most of the rest of that day. She saw Marmolejo, whom she knew as Pudgie, three times that day (R. T. 68-70, 79). First, she saw him in the morning when they went to score; next she saw him when he and a friend came to Andrew's house, while Andrew and Rodriguez were at the store, and finally she saw him when the transaction took place (R. T. 69). On the first occasion, they met about 1:00 or 2:00 p. m. at

Andrew's house. She, Andrew and Pudgie went to score and fix. They fixed at Andrew's house. The fix was not a strong one and lasted only an hour or an hour and a half (R. T. 69, 70, 80-84).

She first saw the package containing the heroin around 4:00 p. m. on December 17 in Andrew's bedroom. The package was wrapped in a paper bag (R. T. 73-74, 79). At 4:00 p. m. she scored again, when Andrew opened the package (R. T. 84). Defendant Rodriguez was not present at the time. The fix at 4:00 p. m. was a pretty good fix, although she didn't take too much because she knew about the sale (R. T. 85). That was the last fix she took that day or that evening. She didn't recall how long the fix lasted but she believes it was two or three hours (R. T. 86).

Defendant Rodriguez arrived about 5:30 p. m. or 6:00 p. m. from Mexico. He arrived before Marmolejo came over the second time (R. T. 72-74). Defendant Rodriguez then left with Andrew, and while they were gone, at about 6:00 p. m. , Marmolejo and another man arrived at Andrew's house. As Marmolejo entered she asked him if Andrew knew he was coming. Marmolejo said no but the man with him wanted some heroin. She said Andrew wasn't here and she didn't think Andrew wanted anybody brought to Andrew's wife's house. Marmolejo stayed and when Andrew and defendant Rodriguez returned, Andrew became upset.

Defendant Rodriguez and Marmolejo did not speak. Marmolejo and Andrew went into the hall where Andrew told Marmolejo that he, Andrew, didn't want Marmolejo and Marmolejo's friend there. Marmolejo and his friend left (R. T. 68-73).

She told Marmolejo to leave because the heroin was there and no one was supposed to come in. She didn't know how the heroin had gotten to Andrew's house. She did know that Andrew and defendant Rodriguez had gone to the store and that Rodriguez had arrived from Mexico on that day. The heroin arrived at the house before defendant Rodriguez did (R. T. 77-78). When Marmolejo was in the house, she already knew there was going to be a sale that evening (R. T. 90).

That evening Andrew, Aurora and defendant Rodriguez drove to the bowling alley. Andrew carried the package and they spoke in English so that defendant Rodriguez wouldn't learn what was going on. When they arrived at the bowling alley, Andrew left the car and approached Agent Heath and Marmolejo. Heath was behind Marmolejo. Andrew said he didn't want to meet with Agent Heath. Andrew and Marmolejo had a conversation and Andrew returned to the car. Andrew handed Aurora the package. Aurora got out and approached Heath and Marmolejo. She asked whether they had the money. When they said yes she returned to the car, took the package and carried it to Heath. She gave Heath the package. There was no conversation at all with the defendant Rodriguez, and Marmolejo never walked up to the car (R. T. 75-76, 91-92).

Roman Lugo Rodriguez, the defendant, testified. He is a citizen of Baja California and does not speak English. On December 17, 1966 he crossed the border about 2:00 p. m. and arrived in Los Angeles about 5:00 p. m. He was making a one

day trip to show Los Angeles to his family. He telephoned Andrew. Andrew came to the liquor store from which he had telephoned, and they returned to Andrew's house. Marmolejo was there and stayed about ten or fifteen minutes. He did not meet Marmolejo at Andrew's house and he had no conversations with Marmolejo. Marmolejo and Andrew conversed in English.

During the ride to the bowling alley, the only conversation he had involved receiving directions. Andrew and Aurora were with him. When they arrived he did not drive back and forth, but he parked the car. Andrew left the car and walked toward the front. Andrew then returned and Aurora left the car and she and Andrew had a conversation. Aurora then walked towards the front until she was with two men. Andrew got into the back seat of the car and didn't say anything. All of a sudden the police came to the car. No one came to his car to have a conversation with him, with Andrew or with Aurora. He did not know what heroin was. He did not bring any heroin into the United States and he did not know that there was heroin at Andrew's house or in the car (R. T. 94-107).

The defense rested (R. T. 107).

There was some rebuttal testimony by Agent Heath and by Agent Chris Saiz. In part, the rebuttal showed that, before stopping, the defendant's car drove through the parking lot three or four times, and that, after stopping, the first conversation took place at the car between Marmolejo and the three occupants (R. T. 107-121).

Both sides rested (R. T. 121).

ARGUMENT

I

THE EVIDENCE WAS PROPERLY ADMITTED AND IS SUFFICIENT TO SUSTAIN THE CONVICTION

The evidence is sufficient to sustain the defendant's conviction. Although insufficiency of the evidence is specified as error, no argument is made to support the specification. Even if the testimony to which objection is made is not considered, the remaining evidence is ample to sustain the judgment below.

The evidence included testimony that Rodriguez had the heroin in his possession, that he gave it to Andrew and that he held it until the sale. He discussed the heroin, and the pending sale arrangements with Marmolejo and Andrew. He drove Andrew and Aurora to the sale location, and, when the arrangements were verified, produced the heroin. Neither Marmolejo nor Heath had an order form.

Defendant's possession allowed the trier of fact to infer that the heroin was illegally imported and that the defendant knew it was illegally imported. 21 U.S.C. §174. The undisputed evidence that the defendant arrived from Mexico that day, when taken with his possession and knowledge of the sale, allows the inference that he had illegally imported the heroin. His possession of the heroin is a clear concealment (Count Seven), and his production for the sale is a clear act of sale (Count Eight). 18 U.S.C. §2. This evidence and the absence of an

order form sustain the third conviction in Count Nine. The trial issue was not the sufficiency of this evidence to establish the violations charged, but whether defendant was an innocent bystander or a participant. The court found he was a participant. Since defendant received concurrent sentences, the judgment below should be sustained, if any count has sufficient supporting evidence. Cellino v. United States, 276 F.2d 941 (9th Cir. 1960); Eason v. United States, 281 F.2d 818 (9th Cir. 1960).

The statements and conversations admitted into evidence were correctly admitted. The conversations as to which defendant Rodriguez now claims error took place in the bedroom in Spanish among Andrew, Marmolejo, and defendant Rodriguez, or between Marmolejo and defendant Rodriguez (R. T. 48-53). See "Supplemental Brief in Support of Motion to Withdraw", p. 5, lines 6-23. This evidence was not objected to at the trial. And no claim is made in the brief that it is substantial error to have admitted any of them. A conversation in the defendant's presence is clearly admissible in evidence. United States v. Gypsum Co., 333 U.S. 364, 393 (1947).

The defendant did object to the admission of a conversation in English which took place before he went into the bedroom (R. T. 30-34). But the admission of this evidence was correct, and the objection was incorrect and properly overruled. The ground for the objection was that the testimony was inadmissible hearsay, that no foundation was shown and that no concert or conspiracy was shown. The defendant did not object on the specific

ground that, even if he were present, he would not be able to understand a conversation in English. Next, the defendant asserted a general objection, when the Government showed that he was present. Again, he did not raise any claim regarding his inability to understand English. At this point, the court offered him an opportunity to voir dire the witness. Defendant's attorney did not do so (R. T. 30-34). No motion was made to strike this testimony at any time during the trial. Any objection on the ground of defendant's inability to speak English must be considered waived.

This objection would have been incorrect. Defendant is unclear about what precisely he considers to be the hearsay evidence: the statement of Andrew to Marmolejo, or an alleged lack of response by the defendant to the statement. The argument, advanced by defendant, that he did not understand English, raises the question of an admission by silence, the defendant's lack of response. However, the Government did not ask whether or not defendant made any response and did not offer any lack of response. The lack of response, rather than the statement which precedes the response, is the evidence which is offered under the doctrine of admission by silence. See 29 Am. Jur. 2d 692, Evidence, §638, and IV Wigmore on Evidence (3rd Ed.) 79, §1072. So any claim that there was error in admitting defendant's lack of response must fail because it is unsupported by the record.

On the other hand, if the objection had been that the

improperly received evidence was Andrew's statement outside the bedroom in English, then any error was cured before the end of trial. The statement became admissible because it was shown to have been made during the course of, and in furtherance of, the conspiracy to import, receive, conceal and sell heroin. Independent evidence, Marmolejo's other testimony, established the conspiracy and defendant's participation. And a statement by Andrew, introducing the defendant as the importer and supplier, to Marmolejo, who was the contact with the ultimate buyer, is clearly made during the course of and in furtherance of the conspiracy.

In United States v. Gypsum Co., 333 U.S. 364, 393 (1947), the court held:

"With the conspiracy thus fully established, the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy, become admissible against all as declarations or acts of co-conspirators in aid of the conspiracy. We think that all of the declarations and acts which we have set forth in this opinion are in aid of the ultimate conspiracy. We do not attempt to fix a date when the conspiracy was first formed. At least, the declarations which we have quoted were made with the purpose of advancing a plan which ultimately eventuated in the licenses of 1929."

The common law on this subject is well summarized as follows:

"Declarations and acts of one conspirator pursuant to or in the furtherance of the conspiratorial purpose are admissible in evidence against any other member of the conspiracy if there is at least prima facie proof of the conspiracy alleged by the prosecution . . . This rule is applicable in a prosecution for a substantive crime where conspiracy is incidentally involved as well as in a prosecution for the crime of conspiracy itself. The rule applies whether or not the conconspirator whose declarations are put in evidence is a codefendant of the conspirator on trial. The evidence is admissible against an original conspirator and also against one who joined the conspiracy after its inception.

"Ordinarily declarations or acts of a co-conspirator should not be introduced in evidence against another member of the conspiracy prior to prima facie proof of the existence of a conspiracy, but if the evidence in its entirety establishes the existence of a conspiracy, the order in which declarations or acts of a co-conspirator are introduced in evidence loses its significance. Hence, the order of proof

of such matter is largely in the discretion of the trial judge." 16 Am. Jur. 2d 147, 148, Conspiracy, §38 (footnotes omitted.)

The admission of the statement in English before the evidence of the conspiracy was a matter of order of proof only. Braatelian v. United States, 147 F. 2d 888 (8th Cir. 1945).

CONCLUSION

The properly admitted evidence is sufficient to sustain the judgment below.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM REIGEL,

Appellant

-vs-

SECURITIES and EXCHANGE
COMMISSION,

Respondent.

MAR 1 1969

MAR 1 1969

No. 22459 ✓

APPELLANT'S REPLY BRIEF

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FILED

MAR 12 1969

WM. B. LUCK, CLERK

UNITED STATES COURT OF APPEALS
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INDEX

| | <u>Page</u> |
|--|-------------|
| Table of Authorities. | i, ii |
| Reply to Commission's Counterstatement of Issues Presented for Review. | 1 |
| I. Reply to Commission's Assertion that the Commission did not Draw an Adverse Inference from Reigel's Failure to Testify. | 2 |
| II. Reply to Commission's Assertion that the Commission did not Rely upon Hearsay Evidence. | 6 |
| III. Reply to Commission's Assertion that there was Nothing Improper or Prejudicial in Refreshing the Recollection of Investor-Witnesses by Show- ing them Memoranda of Prior Interviews. | 8 |
| Reply to Commission's Assertion that Reigel's Election to Forego Counsel at the Initial Hearing Provides no Basis for Attack on the Commission's Decision. | 10 |
| IV. Reply to Commission's Assertion that the Remedial Action Taken Against Reigel was Well With- in the Commission's Discretion. | 12 |
| V. Reply to Respondent's Assertion that Reigel Participated in the Public Distribution of Unregistered Jayark Stock | 14 |
| VI. Reply to Commission's Assertion that Reigel Wilfully Violated Anti-fraud Provisions in the Sale of Registered Jayark Stock. | 21 |

TABLE OF AUTHORITIES

| <u>CASES:</u> | <u>Page</u> |
|--|-------------|
| <u>Barnett v. United States,</u> 319 F. 2d 340 (C.A.8, 1963) | 18 |
| <u>Batten & Co. v. S.E.C.,</u> 345 F. 2d 82 (C.A. D.C., 1964) | 18 |
| <u>Brennan v. Midwestern United Life Ins. Co.</u> 259 F. Supp. 673 (N.D.Ind., 1966) | 18 |
| <u>Burley & Co.,</u> 23 S.E.C. 461 (1946) | 18 |
| <u>M. G. Davis & Co. v. Cohen,</u> 256 F. Supp., 128 (C.A. 2, 1966) | 16 |
| <u>Elder v. Bd. of Medical Examiners,</u> 241 C.A. 2d 246, 50 Cal.Rptr.304 (1966) | 14 |
| <u>Garrity v. New Jersey,</u> 385 U.S. 493 (1967) | 14 |
| <u>Luckhurst & Co.,</u> 40 S.E.C. 539 (1961) | 18 |
| <u>Mason, Moran & Co.,</u> 35 S.E.C. 85 (1953) | 18 |
| <u>People v. Flores,</u> C.A.2d Crim 15501, Feb. 14, 1969 | 19, 20 |
| <u>Pettit v. American Stock Exchange,</u> 217 F. Supp. 21 (S.D. N.Y., 1963) | 18 |
| <u>Pierce v. S.E.C.,</u> 239 F. 2d 160 (C.A. 9, 1956) | 12 |
| <u>Henry P. Rosenfeld,</u> 30 S.E.C. 941 (1950) | 18 |
| <u>Ross v. Licht,</u> 263 F.Supp. 395 (S.D. N.Y., 1967) | 18 |
| <u>San Francisco Mining Exchange v. S.E.C.,</u> 378 F. 2d 162 (C.A. 9, 1967) | 12 |

| <u>CASE</u> | <u>Page</u> |
|--|-----------------|
| <u>S.E.C. v. Scott Taylor & Co.,</u> 183 F. Supp. 904 (S.D. N.Y. 1959) | 18 |
| <u>S.E.C. v. Timetrust, Inc.</u> 28 F. Supp. 34 (N.D.Cal. 1939) | 18 |
| <u>Shively v. Stewart, 65 Cal. 2d 475,</u> 421 P. 2d 465 (1966) | 14 |
| <u>Spevak v. Klein, 385 U.S. 511 (1967)</u> | 5, 7, 14 |
| <u>Strathmore Sec. Inc. v. S.E.C.,</u> C.C.H. Fed. Sec. L.Rep. Par.92,335 (C.A.D.C., Jan 24, 1969) | 4, 5 |
| <u>William Todd, Inc.</u> 32 S.E.C. 537 (1951) | 18 |
| <u>Universal Camera Corp. V. National</u> <u>Labor Relations Board,</u> 340 U. S. 474 (1951) | 3 |
| <u>STATUTES:</u> | <u>PAGE</u> |
| <u>Securities Act of 1933, §5(a) and (c),</u> 15 U.S.C. 77e(a) and (c) | 14, 15, 16 |
| <u>Securities Exchange Act of 1934, §15(b)(7)</u> <u>§15 U.S.C. 78o (b)(7)</u> | 17 |
| <u>Securities Exchange Act of 1934,</u> <u>§15(b)(5)(E), 15 U.S.C. 78 o(b)(5)(E)</u> | 17 |
| <u>Cal. Code Civ. Proc. 2047 (repealed)</u> | 9, 10 |
| <u>Cal. Govt. Code, 11513(c)</u> | 7 |

I

REPLY TO COMMISSION'S COUNTERSTATEMENT OF ISSUES
PRESENTED FOR REVIEW

It is not Reigel's purpose to argue the merits of Respondent's counterstatement of issues presented for review, however, it must be pointed out that the counterstatement does not accurately reflect the issues presented for review. The Respondent presents, as established, an issue which in fact is in dispute and which will be argued before this Court. For example, Respondent's issue No. 1 (Resp. Br. p. 1) reads as follows:

"Was there substantial evidence that a securities salesman wilfully violated Anti-fraud provisions of the Federal Securities Laws when the record shows that(B) He predicted a rapid, substantial price rise for those securities on the basis of negotiations between the issuer and others, when he had no reason to believe the negotiations would result in an agreement, or whether the agreement would be profitable for the issuer?" (Emphasis added.)

There is evidence in the record to show that Reigel had a reasonable basis for his belief that an agreement was being reached.^{1/} Whether the evidence is sufficient is a question for this Court to decide, but the Respondent cannot avoid having this Court consider that question by taking as given an issue which is very much in dispute.

/ Duke Goldstone testified that the acquisition of the film rights was very probable and that negotiations were actually completed. (R. 497, 498, 499, 500). Colton testified that the salesmen were informed about the negotiations. He was not asked how detailed the information he received was, he stated only that he did not tell them that the deal was closed. (R. 444, 445.)

A similar tactic is displayed by the Respondent when it asks in Issue No. 3(a) whether "the order is subject to review because prior to the hearing the recollection of witnesses against the Respondent had been refreshed by accurate memoranda of their prior statements." (Emphasis added). There is no evidence in the record which would indicate whether or not the memoranda in question were or were not accurate. (See Reigel's discussion of this point on page 8 to 9, (infra).

II

REPLY TO COMMISSION'S ASSERTION THAT THE COMMISSION DID NOT DRAW AN ADVERSE INFERENCE FROM REIGEL'S FAILURE TO TESTIFY.

The Commission evidently believed that by stating in its opinion that it was not relying on an adverse inference from Reigel's failure to testify (R. 2009), it neatly avoided any bothersome Constitutional issue. However, the Commission's assertion that it based its findings on an independent review of the record does not stand up on close examination, because any consideration by the Commission of the Hearing Examiner's findings fortiori also took into consideration all of the factors, including the inference that led the Hearing Examiner to make his stated findings. Furthermore, findings of the Hearing Examiner are necessarily a part of the record, and the Commission

must give due weight to them.^{2/} That those findings were greatly influenced by the improper inference is shown by the Hearing Examiner's evaluation of the testimony given by the only two witnesses offered by the Division to prove Reigel's alleged misrepresentation. In crediting that testimony the Hearing Examiner stated:

"After having heard these witnesses and observing their demeanor the Hearing Examiner credits their testimony. Moreover, neither Cook, Pambrun, Fleischman nor Reigel testified at the hearing in their own behalf. Their failure to do so is deemed a factor of substantial significance, warranting the inference that their testimony would have been adverse." (R. 1691). (Emphasis added).

The Commission's argument is to the effect that it could disregard an inference which affected the Hearing Examiner's findings as to the credibility of the only two witnesses who testified against Reigel. But the Commission cannot know whether the testimony of those witnesses would have been credited but for the improper inference. The Commission certainly was not in a position to evaluate the credibility of these witnesses from the cold record. Although the Commission need not hear the witnesses testify, the Commission must at least give due weight to the findings of the one who did observe the demeanor of the witnesses.^{3/} But in the instant case,

^{2/} Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 493 496, 497 (1951).

^{3/} Ibid.

to give due weight to those findings, would mean that the Commission had not disregarded the improper inference, but had actually incorporated it into its own findings. Indeed, there is evidence in the Commission's Opinion itself that it did not disregard Reigel's failure to testify. The Commission asserts in its Opinion that:

"Respondents have no knowledge of the terms of any agreement with Goldwyn, or the nature and quality of the film library, or of any of the other pertinent considerations making for the success or failure of such a venture."
(R. 2004).

The Commission cites no evidence in the record for this conclusion. Unless the Commission has inferred from the failure of Reigel and others to testify that they had no such information, it is difficult to see how the Commission reached this conclusion. The Commission certainly cannot contend that it does not have the burden of proving its charges, but can shift to Reigel the burden of proving that he did not violate the law.

Strathmore Sec. Inc. v. S.E.C.^{4/} cited by the Commission for the proposition that it can properly disregard such an inference drawn by the Hearing Examiner is clearly distinguishable from the case at bar. In Strathmore Securities, Inc. v.

/ (Resp. Br. p. 23) C.C.H. Fed. Sec. L. Rep., Par. 92, 335
t 97,605 n. 2 (C.A. D.C., Jan. 24, 1969).

SEC, the Hearing Examiner "stated clearly that his findings did not need the support of the inference."^{5/}Therefore, in Strathmore, the Commission had not been presented with a record in which the findings with regard to the credibility of witnesses was incurably tainted by an unconstitutional inference. Nevertheless, the Court in Strathmore, citing Spevak v. Klein,^{6/} stressed the seriousness of the Constitutional question presented, but concluded that it was not necessary to decide the issue due to the fact that both the Hearing Examiner and the Commission stated that their findings did not rely on the inference.^{7/}

Contrary to the argument presented by the Commission (Resp. Br. p. 24) Colton clearly expressed the views of those individuals who did not wish to testify, including Reigel, (R.518). Whether or not the statement by Colton was completed is irrelevant.

The Commission argues that although Reigel was not represented by an attorney at the Hearing, he was represented prior to the reopening of the record for testimony by another respondent, and that Reigel's attorney should have urged the Hearing Examiner to decide the reserved question so that he could determine whether Reigel should take the stand. (Resp.Br. p. 24-25).

/ Ibid.

/ Spevak v. Klein, 385 U.S. 511 (1967)

/ C.C.H. Fed. Sec. L. Rep., Par. 92, 335 at 97,605 n.2.

the Commission's argument in this regard is particularly confusing since they cite a portion of the record which shows that Reigel's attorney did urge the Hearing Examiner to decide this point. (R. 610, 611). Furthermore, the Commission must be aware that the re-opened hearing was expressly limited to the purpose of hearing the testimony of Nees, and allowing Nees to cross-examine the witnesses who testified against him. It should be further noted that Reigel's attorney did request that the proceedings be broadened to cover evidence introduced at the prior hearing, and that the Hearing Examiner rejected this request. (R. 551-555).

III

REPLY TO COMMISSION'S ASSERTION THAT THE COMMISSION DID NOT RELY UPON HEARSAY EVIDENCE.

In order to refute Appellant's argument that the Commission relied upon incompetent hearsay evidence in concluding that Reigel had no reasonable basis for representations made to him, the Respondent now asserts that the Commission made no findings with regard to whether there was actually a "deal" between Jayark Films and Goldwyn. (Resp. Br. p. 25). Respondents further argue that the finding that Reigel had no adequate basis for his representations was based in part upon a conclusion that Respondents had no knowledge of the terms of any agreement with Goldwyn, or the nature and quality of the film library, or of any other pertinent considerations making for the success or

failure of such a venture'". (R. 2004). However, no evidence in the record to substantiate that conclusion is cited or in fact exists. None of the witnesses at the Hearing were asked if they had this information, and the Commission surely cannot be justified in drawing such a conclusion from the failure of Reigel to take the stand and testify as to his knowledge of the details of the negotiations.^{8/} Indeed, the only explanation for such a conclusion on the part of the Commission is that, contrary to their protestations (R. 2009), the Commission did, in fact, draw an improper inference from Reigel's failure to testify.

After contending the Commission did not rely on the hearsay evidence contained in the Slaff letter, the Commission states that "in any event, technical rules of evidence do not apply in an Administrative Proceeding" (Resp. Br. p. 26). As the Respondents pointed out, Reigel has conceded that technical rules of evidence do not apply. However, surely the Respondent cannot contend that evidence should be admitted if it is not the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs."^{9/}

^{8/} Spevak v. Klein, 385 U.S. 511 (1967).

^{9/} Cal. Govt. Code, 11513(c).

As pointed out in Appellant's Opening Brief (p. 26-27) due to the obvious prejudice of Goldwyn's attorney, the author of the hearsay evidence in question, there is a serious question as to whether the evidence in question would even meet that requirement.

REPLY TO COMMISSION'S ASSERTION THAT THERE WAS
NOTHING IMPROPER OR PREJUDICIAL IN REFRESHING
THE RECOLLECTION OF INVESTOR-WITNESSES BY SHOW-
ING THEM MEMORANDA OF PRIOR INTERVIEWS.

The Commission asserts that the memorandum of interviews which were used to refresh the memory of witnesses were "highly accurate" (Resp. Br. p. 26), and cites the statements of two witnesses who made that evaluation more than a year after the interviews in question. (R. 290, 316). It should be noted that neither of the witnesses who made the statements referred to were part of the case against the Appellant herein, so that their evaluations can have no relevance to the accuracy of the writings used to refresh the memory of witnesses who testified against Reigel. The Commission further states that Respondents were aware of the refreshing techniques while the witnesses were on the stand (Resp. Br. p. 26); no citation to the record is offered for this proposition and the record itself clearly refutes this argument since all references in the Transcripts to this refreshing technique occur after the testimony

of the witnesses who testified against Reigel. ^{10/}

Furthermore, it is irrelevant that "no claim is made that the investigators did anything more than simply ask questions at the original interview." (Resp.Br.p.26). What Reigel is objecting to is the fact that the witnesses had their memories refreshed by memorandums prepared by the Division, not by the witnesses. The extent to which such memorandums were phrased by Mr. Hiller instead of by the witnesses could have been the difference between an alleged misrepresentation and an innocent representation. This point is buttressed by the fact that an investigator, such as Mr. Hiller, is inevitably going to include in such memorandums statements which tend to show violations of the law, and not statements which would tend to exculpate the alleged offender. Since Reigel was not represented by counsel he was not aware of his right to examine and cross-examine with respect to such writings. California law, at the time of the hearing, would not have allowed this refreshing technique. Code of Civil Procedure Section 2047 established

0/ (R. 530, 531) Investigator Hiller testimony, (R. 299,360) testimony of two witnesses regarding accuracy of memorandums, (R. 138-164) testimony of witnesses presented against Reigel.

Respondent cites page 365 of the Record for the proposition that an examination of one of the memoranda was permitted. However, page 365 makes no reference to such an occurrence.

the proper evidentiary standard to be applied at the time of the hearing. 11/

REPLY TO COMMISSION'S ASSERTION THAT REIGEL'S ELECTION TO FOREGO COUNSEL AT THE INITIAL HEARING PROVIDES NO BASIS FOR ATTACK ON THE COMMISSION'S DECISION.

It is clearly irrelevant for the Commission to point out the "it is no fault of the Commission that Reigel chose not to be represented by counsel" or that "there is no requirement that counsel be provided" (Resp. Br. p. 28). Reigel has not contended otherwise. It is clearly relevant, however, in assessing the impact of the other procedural infirmities of the Hearing to take note of Reigel's lack of counsel. Interestingly enough, the Commission does not dispute that a lack of counsel would multiply the impact of other procedural irregularities, but merely asserts that there were no other procedural irregularities (Resp. Br. p. 28). Of course, that determination is for this court, and not for the Commission to make.

11/ "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction at the time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing." (Emphasis added) C.C.P. § 2047 (repealed).

The Commission argues blatantly contrary to the fact asserting that the attorney subsequently retained by Reigel has only recently decided that these infirmities exist". (Resp. p. 28). The record clearly shows that Reigel's attorney raised these issues before the Hearing Examiner upon his first opportunity to do so, which was prior to the re-opened hearing, and prior to the Initial Decision; these issues were raised in the "Opposition to Proposed Findings, Conclusions and Brief on Behalf of the Division of Trading and Markets, and Proposed Findings, Conclusions and Brief on Behalf of Respondents, William Reigel, Pierre Pambrun and Jay B. Cook" dated Dec. 20, 1965.^{12/} Reigel's attorney again^{13/} raised these issues at the re-opened hearing.

Even assuming that the Respondent is correct that the Hearing Examiner made it clear^{14/} that he would not admit the

/ PP. 66-67, introduction of incompetent hearsay evidence; pp. 70-72, improper education of witnesses; pp. 68-70, introduction of irrelevant prejudicial evidence which induced Reigel not to testify; pp 62-63, opposition to Division's argument that inference of guilt should be drawn from failure to testify.

/ R. 611, 612, objected to education of witnesses; R. 610, requested ruling on introduction of irrelevant prejudicial evidence, R. 560, objected to incompetent hearsay evidence; since the Hearing Examiner had not yet indicated that he had drawn an improper inference, Reigel's attorney could not have raised the issue at the re-opened hearing.

/ The actual language used by the Hearing Examiner is somewhat ambiguous and would be particularly so to a layman. (R. 469-470).

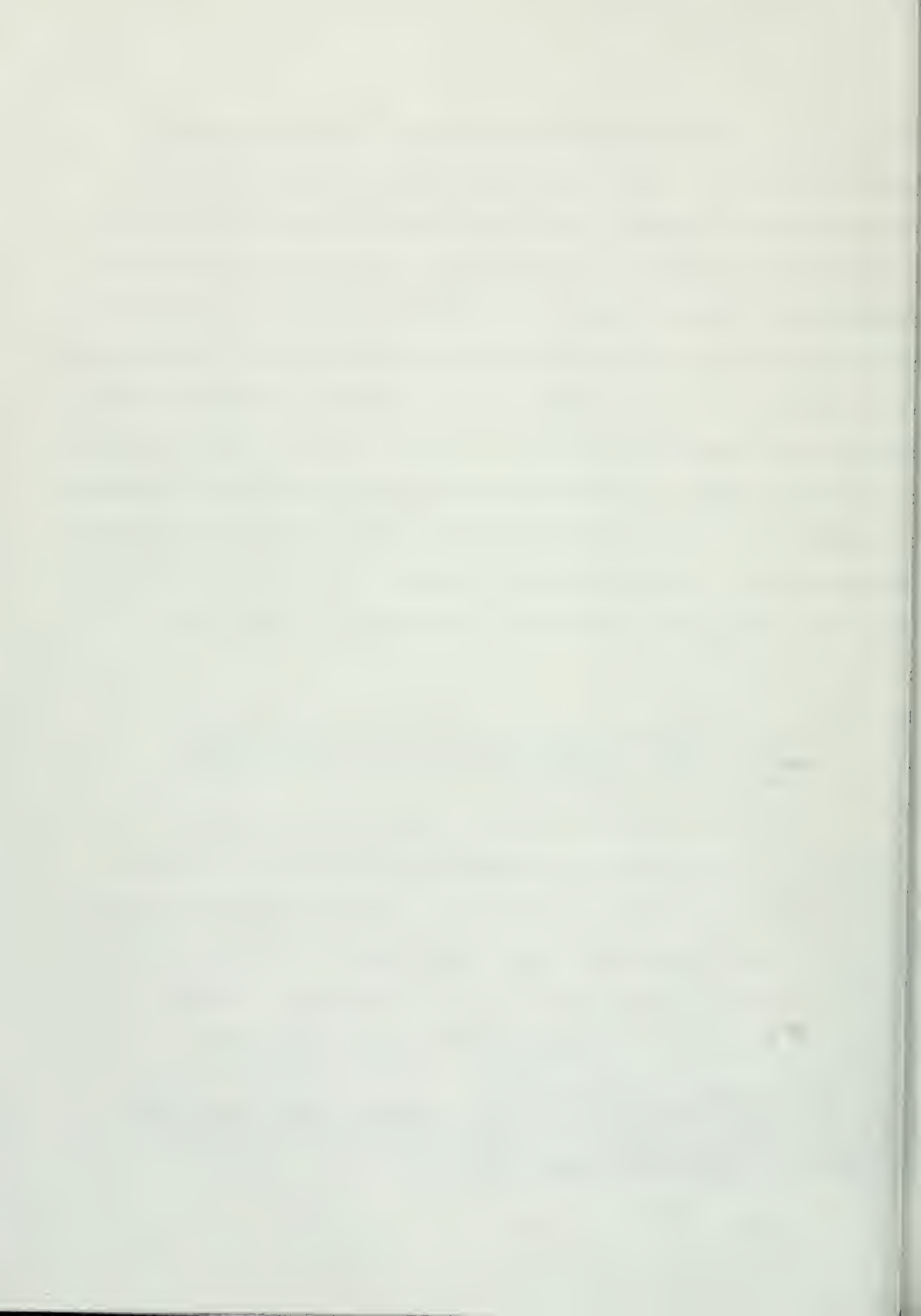
evidence until he satisfied himself that it would be proper" (Resp. Br. p. 29, n. 35), this would have no bearing on the dilemma faced by Reigel. The Hearing Examiner had stated that he thought the evidence was proper (R. 469-70), and Reigel could certainly not read the mind of the Hearing Examiner and determine that he would later change his mind and conclude that the evidence was inadmissible. The failure by the Hearing Examiner to rule on the matter and there that the Division's line of questioning was irrelevant placed Reigel in a position where if he testified it amounted to a gamble upon the Hearing Examiner's ultimate ruling upon the reserved point. This did not give Reigel a free choice in the matter and was highly prejudicial. (App. Op. Br. pp. 14-16)

VI.

REPLY TO COMMISSION'S ASSERTION THAT THE REMEDIAL ACTION TAKEN AGAINST REIGEL WAS WELL WITHIN THE COMMISSION'S DISCRETION.

The Respondent has not even attempted to reply to Appellant's argument that the Commission must apply reasonable standards in determining the sanctions to be imposed upon alleged violators of the Securities Laws. The Appellant has not disputed that the Commission has power to alter the penalty imposed by the Hearing Examiner, so the cases cited for this proposition by the Commission are irrelevant. ^{15/}

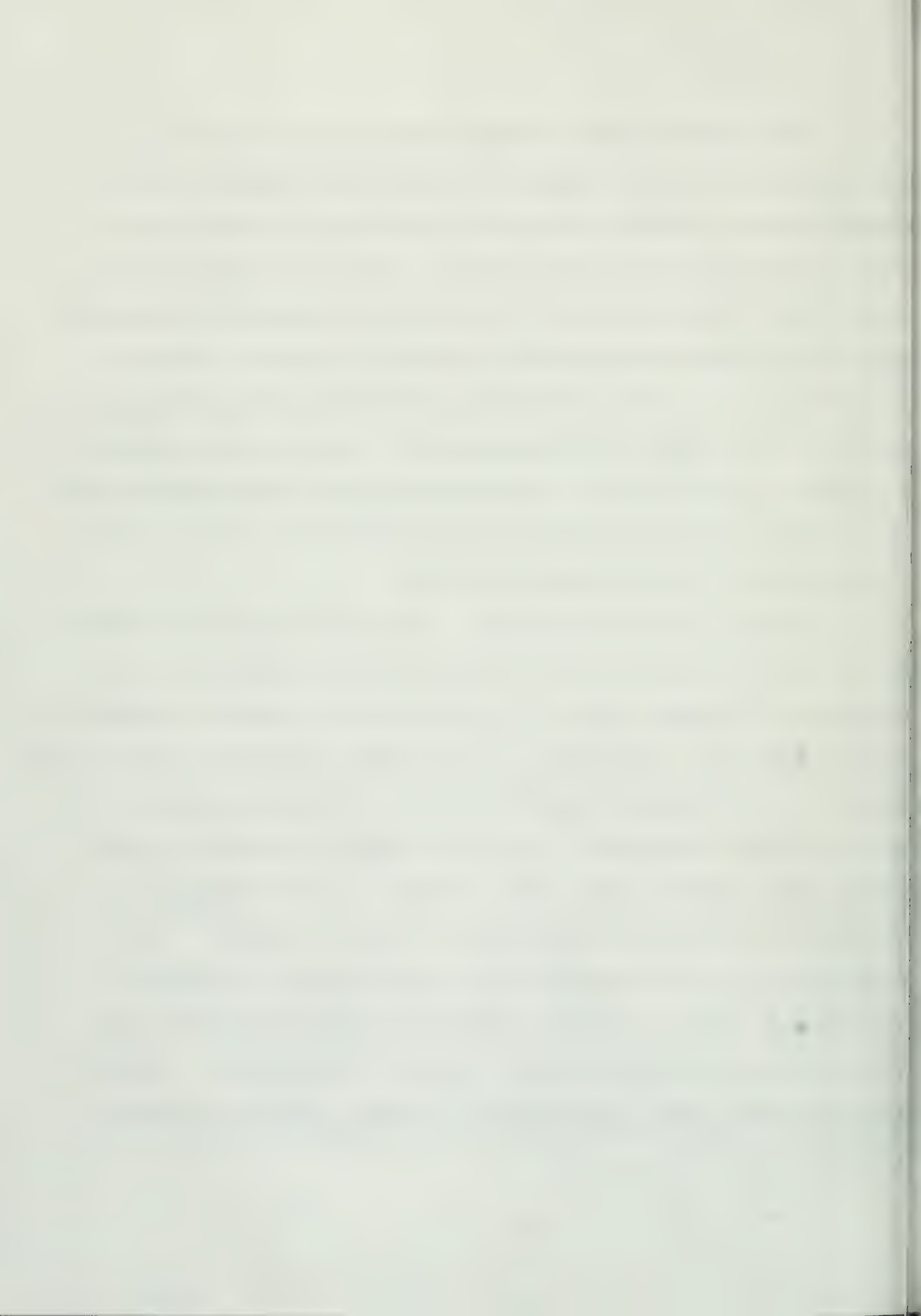
15/ (Respondent's Brief pp. 22, 30) Pierce v. Securities and Exchange Commission, 239 F. 2d 160 (C.A. 9, 1956); Resp. Br. p. 31; San Francisco Mining Exchange v. SEC, 378 F. 2d 162, (C.A.9, 1967).



The argument made by Reigel has been, and still is, that the great disparity between the sanctions imposed by the Hearing Examiner and the sanctions imposed by the Commission indicate either that the record failed to reflect accurately the tenor of the testimony, due to the numerous procedural irregularities, or that the Commission did not apply rational standards in determining the penalties which prohibited conduct calls for. Surely the Commission cannot contend that they are not required to adhere to standards, but can arbitrarily and capriciously mete out sanctions which can deprive individuals of the right to earn a livelihood in their chosen profession.

Reigel is not arguing that his penalty should be reduced because other individuals have received lighter penalties, so respondent's argument that it is irrelevant to compare remedies is itself irrelevant. (Resp. Br. p. 33). Reigel is arguing that the Commission, in deciding the remedies which an offense warrants, must apply reasonable standards. To avoid Reigel's position in this regard, the Commission has again offered the stale argument ^{16/} that the provisions of the Exchange Act are not penal. It is becoming more and more apparent that disciplinary proceedings subjecting a person to license revocation demand the same constitutional safeguards as would a criminal proceeding. Recent cases recognize that constitutionally objectionable procedures

6/ Resp. Br. p. 32.



cannot be hidden under the cloak of "remedial measures for
the public interest." ^{17/}

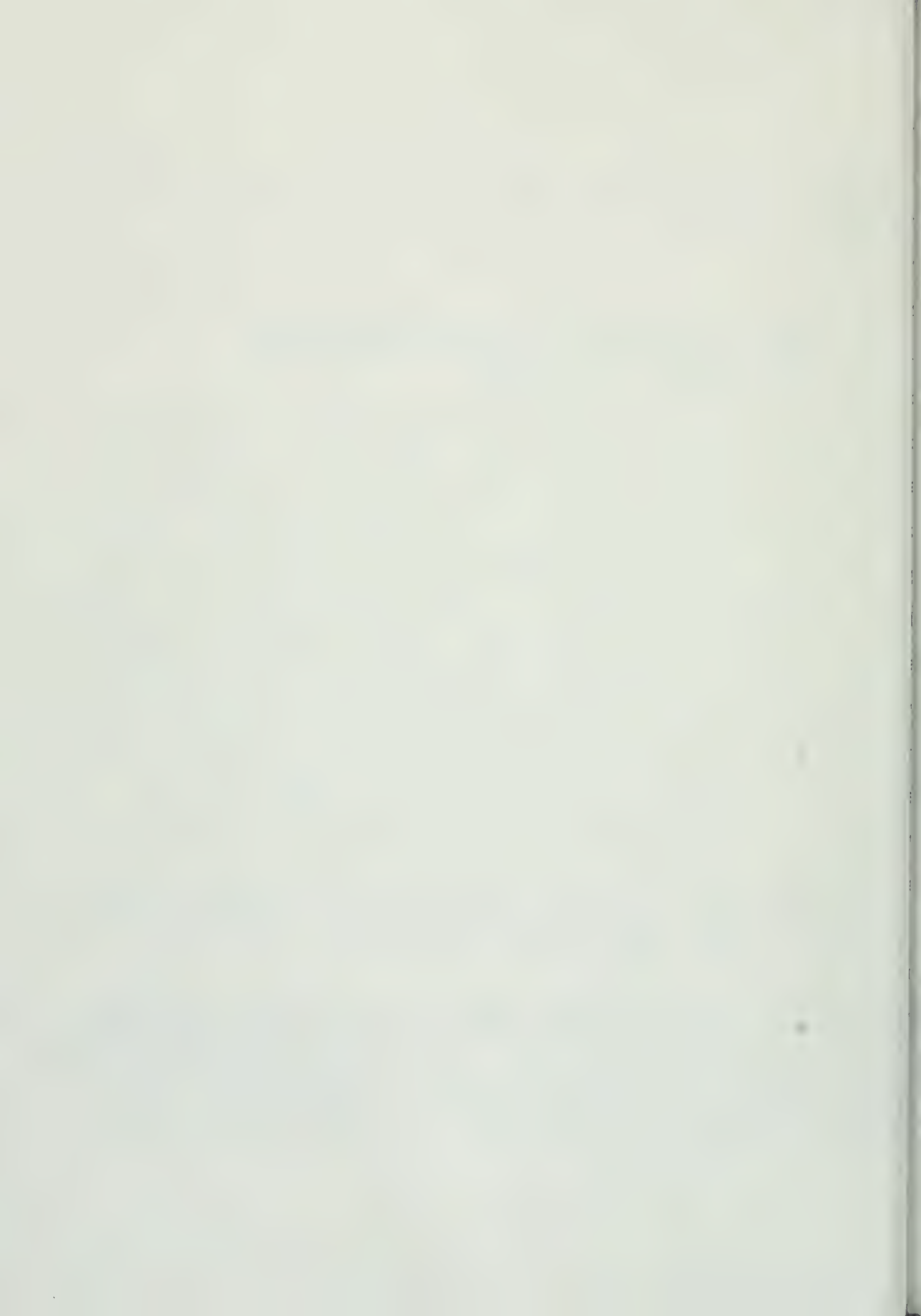
VII.

REPLY TO RESPONDENT'S ASSERTION THAT REIGEL PARTICIPATED IN THE PUBLIC DISTRIBUTION OF UNREGISTERED JAYARK STOCK.

The Respondent admits that Reigel did not sell unregis-
tered securities (Resp. Br. p. 17). However, in an attempt to
circumvent this admitted fact, it is argued that Reigel "aided
and abetted" in the sale of unregistered securities. (Resp. Br.
p. 18). Respondent's argument in support of this belatedly asserted
proposition is incorrect for several reasons, (discussed infra),
not the least of which was that Reigel was never charged with
aiding and abetting in the sale of unregistered securities. The
Order for Proceedings does not charge that Reigel aided and
abetted in the sale of unregistered securities. ^{18/} Neither the

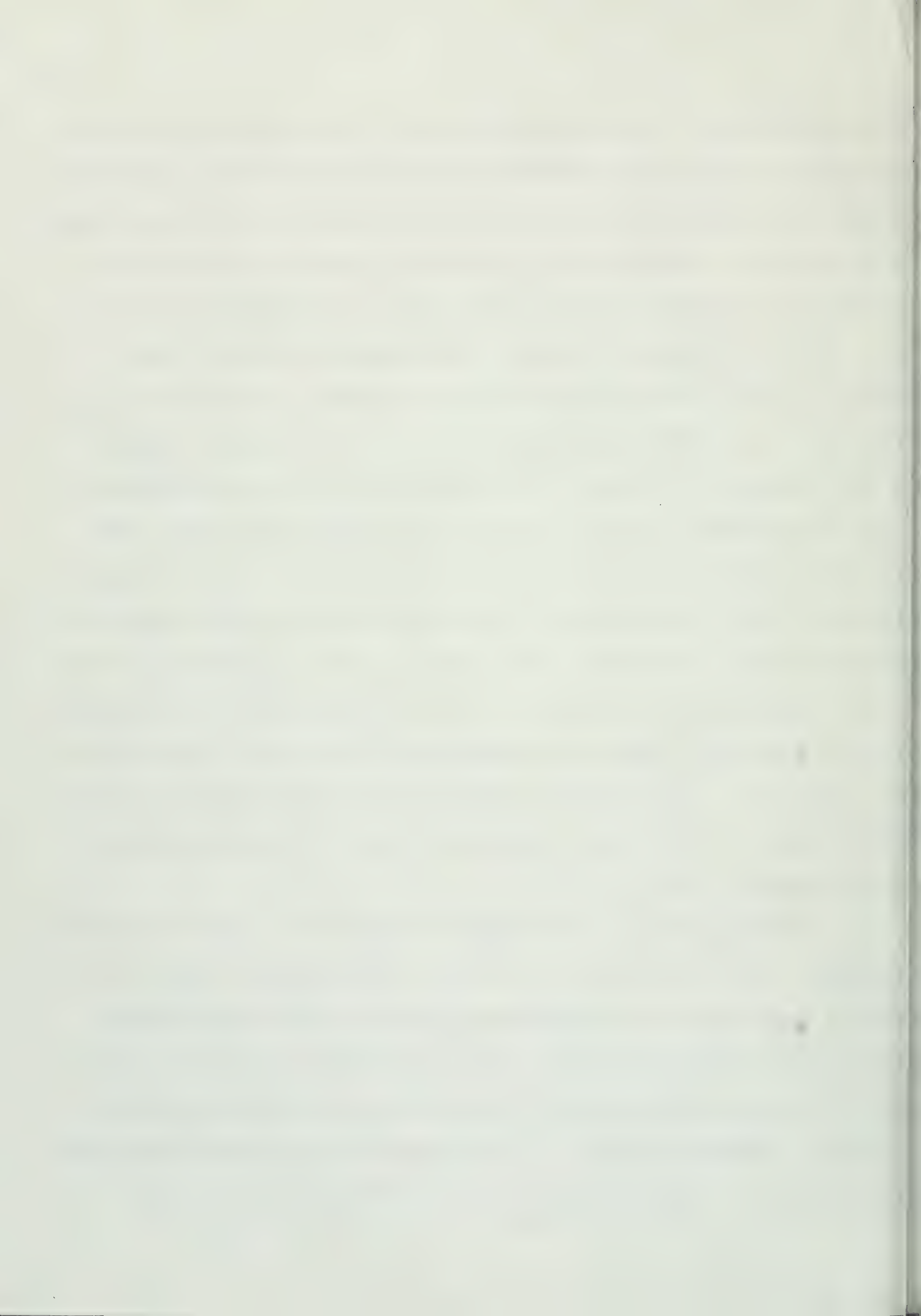
^{17/} Garrity v. New Jersey, 385 U.S. 493 (1967); Spevak v. Klein,
35 U.S. 511 (1967); Shively v. Stewart, 65 Cal.2d 475, 421 P.2d
65 (1966); Elder v. Bd of Medical Examiners, 241 CA 2d 246;
10 Cal. Rptr. 304 (1966)

^{18/} R. 128-132). The pertinent part of the Order for Proceeding
is: "directly and indirectly, offered to sell, sold and delivered
after sale, certain securities" The word "indirectly" appears
in the Act only with reference to the use of the mails and inter-
state commerce, and therefore could not be interpreted as pro-
hibiting "aiding and abetting". Securities Act of 1933, §5(a)
and (c), 15 U.S.C. 77e (a) and (c).



Hearing Examiner in his Initial Decision, (R. 1667-1705), nor the Commission in its Opinion (R2000-2011) found that Reigel had aided and abetted in the sale of unregistered securities. Indeed, neither the Division nor the Commission has ever argued in their Briefs that Reigel aided and abetted in the sale of unregistered securities. In its "Proposed Findings, Conclusions and Brief" dated October 7, 1965, the Division referred to Reigel as "activist in effecting the purchase for Registrant" (p. 7). However, Reigel was not charged with being an activist in effecting the purchase of the unregistered shares, for the very simple reason that the statute which he was accused of violating prohibits the selling, offering to sell and delivery after sale of unregistered securities. Securities Act of 1933 Sec. 5(a) and(c), 15 U.S.C. 77e (a) and (c). The Hearing Examiner avoided the problem altogether by discussing only whether Reigel should have known that the shares should have been registered, and by never coming to grips with the question of whether Reigel in fact sold, offered to sell or delivered unregistered shares (R. 1675).

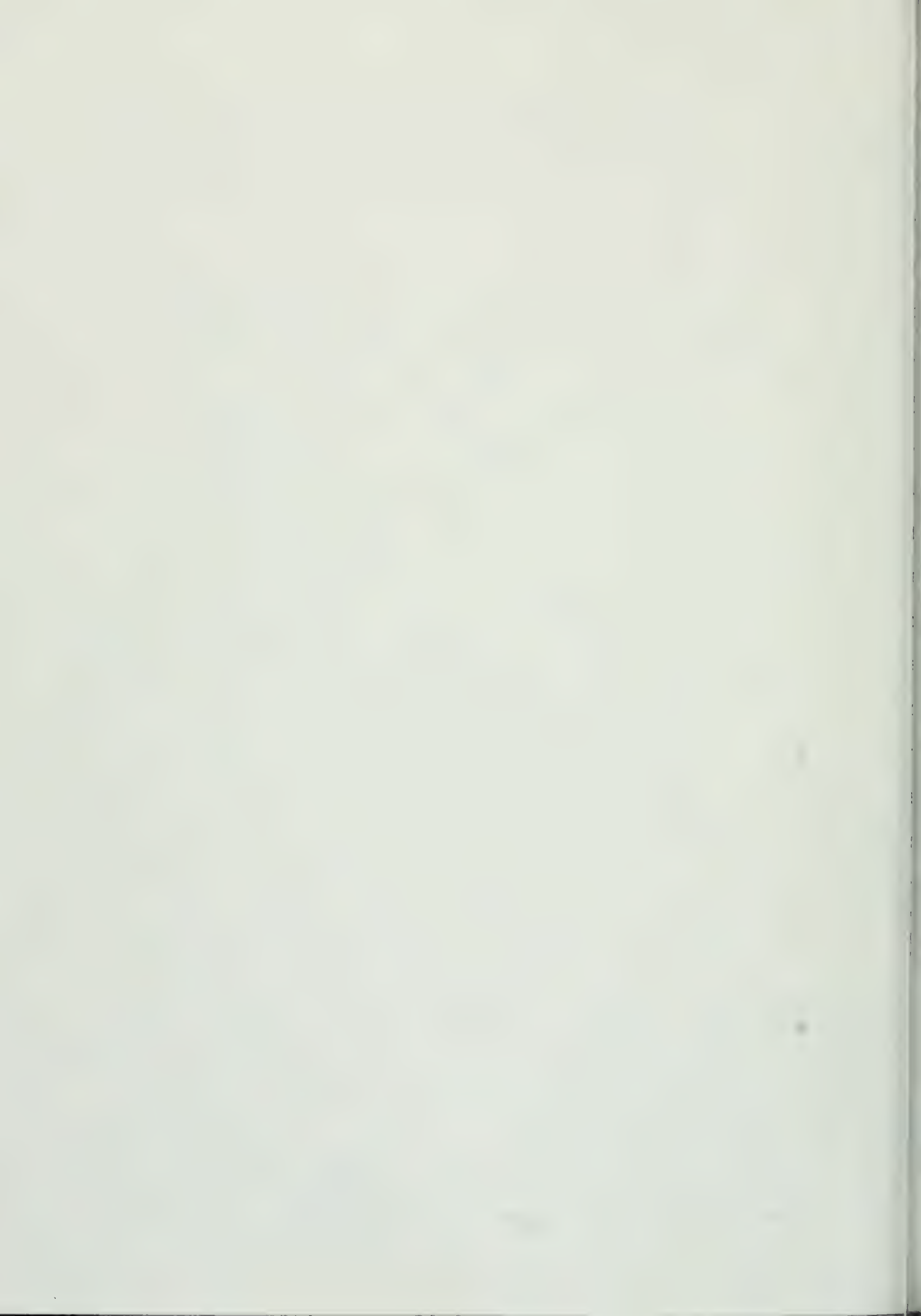
The Commission in its Opinion skirted the issue by finding that Reigel "participated in the sale of unregistered securities." However, Reigel was not charged and could not have been charged with "participating in the sale of unregistered securities", because the statute which he was accused of violating required that he "sold", "offered to sell" or "delivered" unregistered securities. Securities Act of 1933, §5(a) and (c), 15 USC 77e (a) to (c).



thus, both the "activist" label by the Division and the "participated" label of the Commission are words used to cloak a fatal omission in the pleading -- to wit, that Reigel was not charged with "aiding and abetting".

It is important to note that the Commission, for the first time in these lengthy proceedings, has argued that Reigel aided and abetted the sale of unregistered securities, completely ignoring the fact that Reigel has never been so charged. It further should be noted by way of comparison that the Commission was careful to allege in its original Order for Proceedings that Reigel aided and abetted violations of other Sections of the Securities Act, and the Exchange Act. (R. 1230, par. C, R. 1229, par. B). There are at least two possible explanations why Reigel is not charged with aiding and abetting the violation of Section (a) and (c) of the Securities act: Firstly, there was no statutory authority for a charge of aiding and abetting until 1964, as admitted by the Division (Resp. Br. p. 18); the alleged violations took place prior to 1964. Secondly, the activities of Reigel could not be sufficient to constitute aiding and abetting.

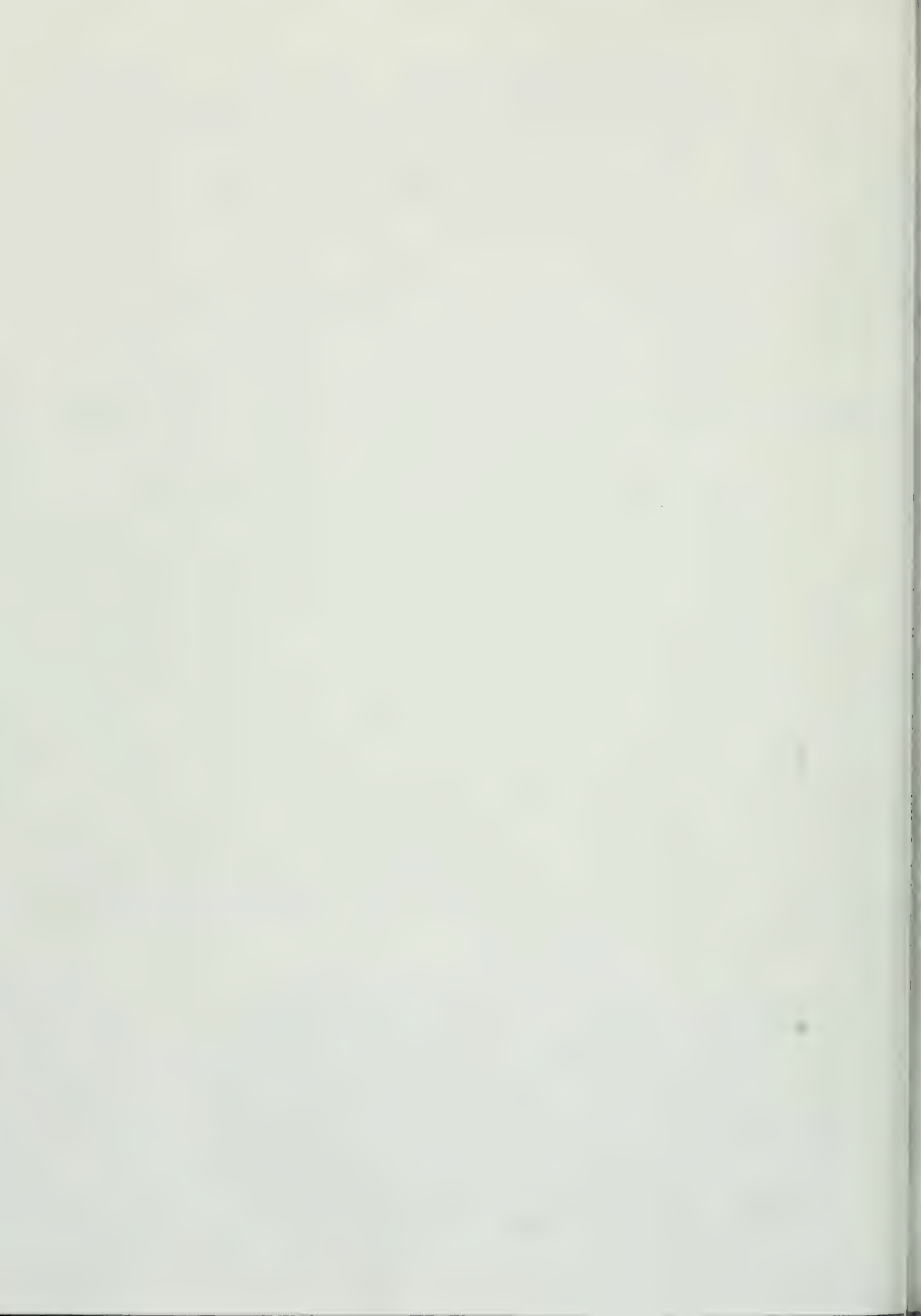
The Respondent attempts to avoid the fact that at the time of the alleged offense, it was not prohibited by statute, but rather cavalierly asserting that "it is not necessary to determine whether these provisions enacted in 1964 were intended to have a retroactive effect: (Resp. Br. p. 18). Respondent cites for this proposition M.G. Davis & Co. v. Cohen, 256 F. Supp. 128 (1966). An examination of the facts in M.G. Davis, supra, shows



clearly that this case will not support a retroactive application of the aiding and abetting provisions of Exchange Act Sec. 15 (b) (5)(E), 15 U.S.C. 78o (b)(5)(E). The 1964 Amendment added several distinct provisions to the Exchange Act. One part of the Amendment provided for bringing a suit directly against a salesman if he had committed an act which previously could have been the basis of a disciplinary proceeding against a broker or dealer who employed him. Exchange Act of 1934 §15(b)(7), 15 U.S.C. 78o (b)(7). M. G. Davis, supra, dealt with this part of the amendment, and the court concluded that in M.G. Davis there was no retroactive application of the statute since the offense in question had been proscribed by earlier law, and the part of the amendment involved granted only a procedural device to sue the employee directly.^{19/} However, in the case at bar we are dealing with an offense which was not previously proscribed by statute, since the section which proscribed aiding and abetting was specifically added to the law by the 1964 amendment and prior to that time there was no statutory authority which would have made such activity the basis of any disciplinary proceeding. Exchange Act Sec. 15 (b)(5)(E), 15 U.S.C. 78o (b)(5)(E).

/ The court stated at pp 134-135:

" . . . since 1936 the Commission has had authority to revoke or deny a broker-dealer registration on the basis of acts or omissions of a person associated with that broker-dealer. 15 U.S.C. §78o. After such a finding, the Commission is empowered to revoke the registration of any other broker-dealer who thereafter employed this person. . . . This effective, if cumbersome device for excluding wrong-doers from the securities field has simply been improved by the 1964 amendment authorizing the institution of disciplinary proceedings directly against salesmen.

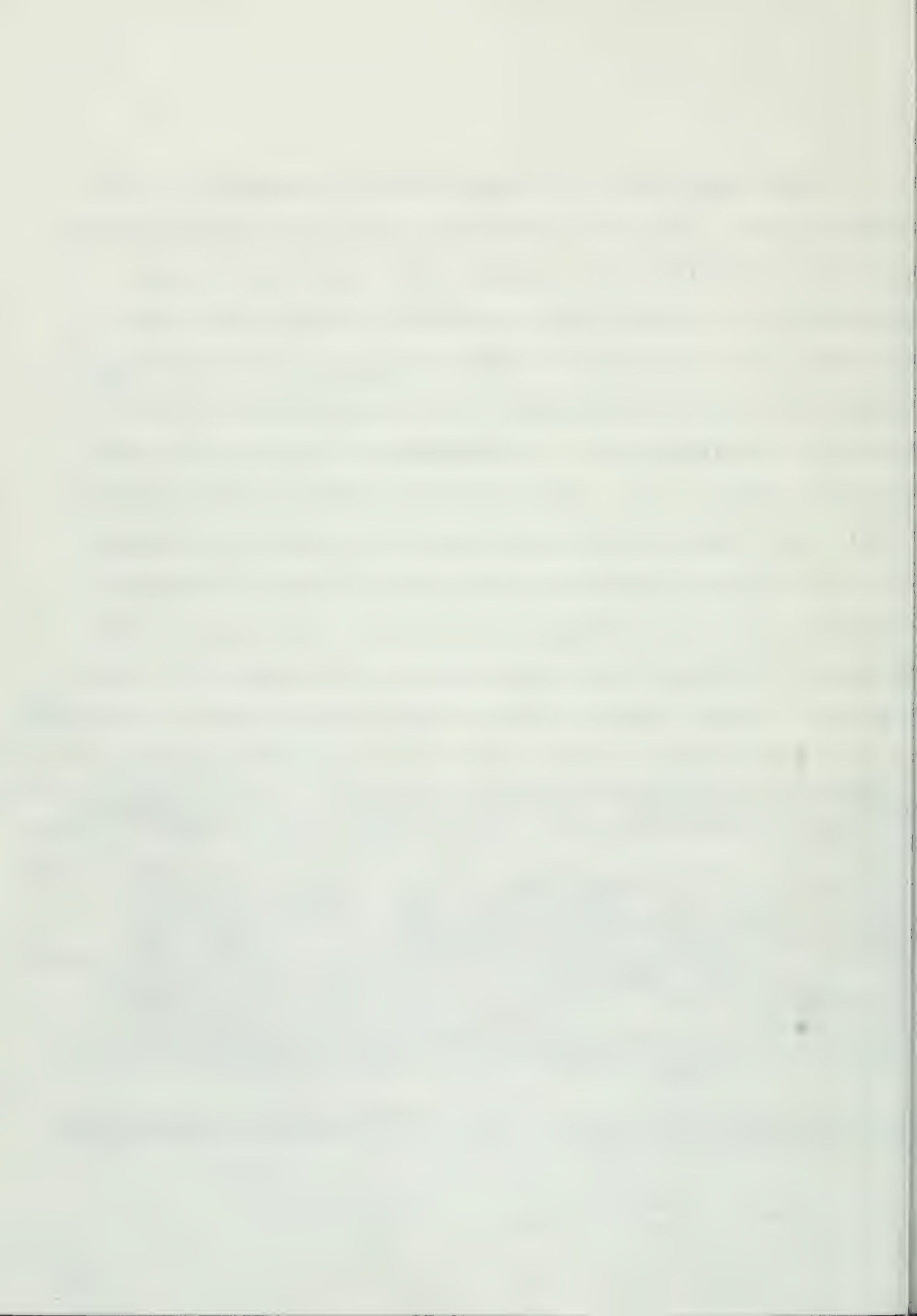


Respondent goes on to argue that the Commission has long interpreted the statute as proscribing aiding and abetting violations of the Securities Act. However, the cases cited by the respondent do not support that proposition. Many of the cases cited dealt with situations in which the owners of the firm were charged with "aiding and abetting" the violations of the firm.^{20/} It must be recognized that it is meaningless to contend that the owners and operators of a firm "aided and abetted" the violations of their firm; such a contention would be considered a tautology were it not for the technical fiction that a firm is a separate entity from its owners and operators. Other cases cited by the respondent^{21/} are cases which could more aptly be described as conspiracies, or joint ventures, and in some instances were so described,^{22/}

0/Resp. Br. p. 18; Batten and Co. v. SEC, 345 F. 2d 82 (C.A.D.C.1964); Barnett v. United States, 319 F. 2d 340 (C.A. 8, 1963); Luckhurst and Company, 40 SEC 539 (1961); William Todd, Inc. 32 SEC 537, (1951).

1/ Resp. Br.p. 18, Ross v. Licht, 263 F. Supp. 395, 410 (SDNY, 1967) (alternative holding), Mason, Moran & Co., 35 SEC 85 (1953); Brennan v. Midwestern United Life. Ins.Co., 259 F.Supp.673,682 (D.Ind.1966); Pettit v.American Stock Exch. 217 F.Supp.21,28 (SDNY 1963); Scott Taylor & Co.,183 F.Supp. 904,909 n.12 (SDNY 1959) SEC v. Timetrust, Inc.28 F.Supp.34, 43 (N.D.Cal. 1939); Burley & Co., 23 SEC 461, 468, n. 11 (1946). Another case cited by the Commission refers to some very unclear dicta in a footnote and therefore has not been discussed here, Henry P. Rosenfeld, 30 SEC 41, 944, n. 3 (1950).

2/ Scott Taylor & Co., 183 F. Supp. at 908; Pettit v. Amer. Stock Exch., 217 F. Supp. at 28.

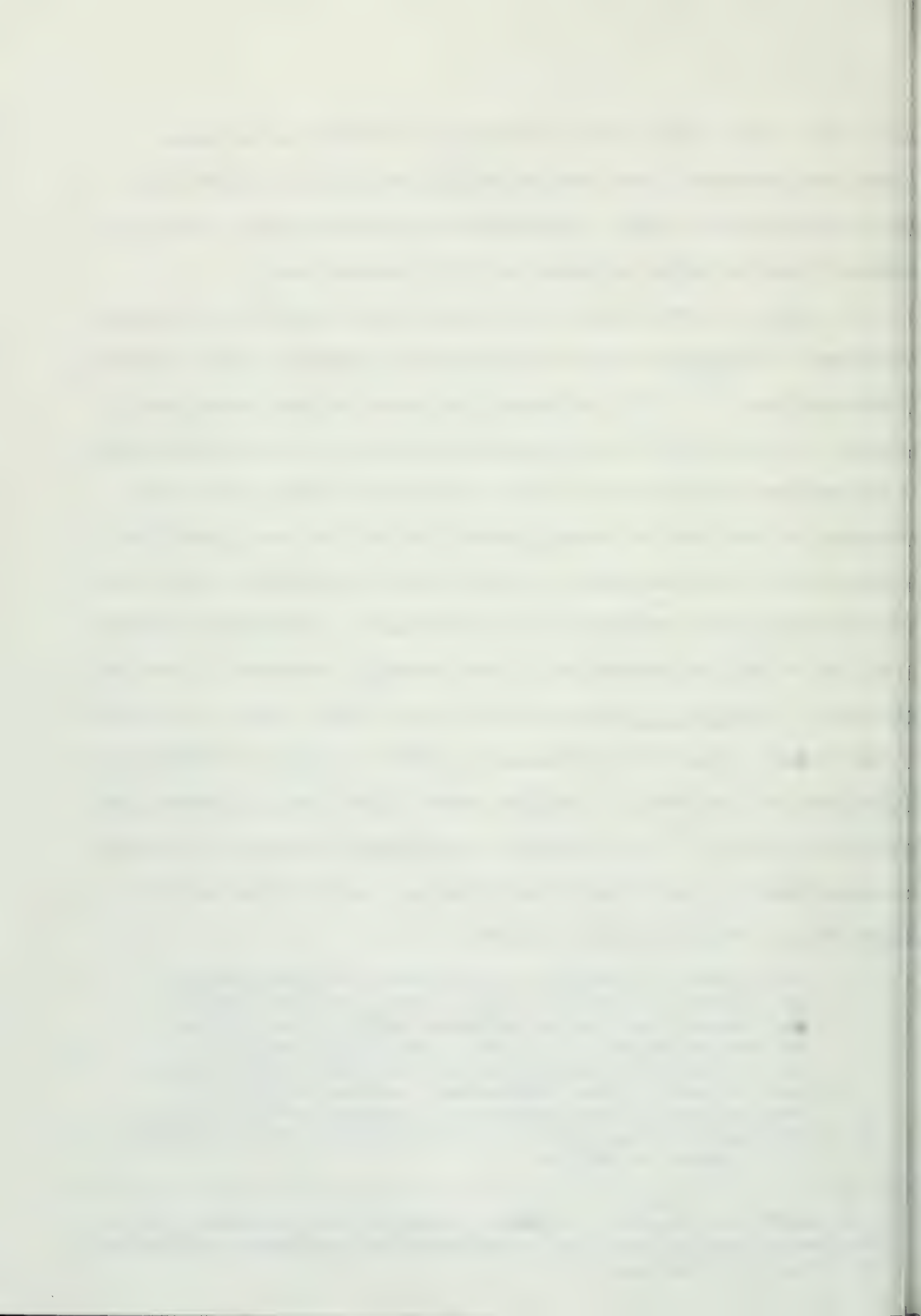


since they dealt with fact situations in which the alleged
aiders and abettors were participating in the violations for
their own gain and there was evidence presented that they were
aware of the unlawful purposes of the transactions.

None of the cases cited dealt with situations in which
a salesman has been accused of aiding and abetting the violation
of his employer.^{23/} This brings up the very serious question of
whether the activity alleged against Reigel could be classified
as aiding and abetting even if it were found that aiding and
abetting in the sale of unregistered securities was proscribed
at the time of his actions. A very recent California case has
defined aiding and abetting as to "instigate, encourage, promote
or aid with guilty knowledge of the wrongful purpose of the per-
petrator". People v. Flores, CA 2d Crim. 15501, Feb. 14, (1969).
In the cases cited by the Commission where aiding and abetting of
violations of the Securities Laws were found these elements are
obviously present. For instance, in Brennan, supra, a corpora-
tion was found to have aided and abetted the violations of a
broker-dealer and the Court stated:

"Defendant knowingly and purposely encouraged an
artificial build-up in the market for its stock.
As a result of the stimulated market, the defend-
ant was allegedly in a more favorable position
for a potential merger which was then negotiating,
and certain of the defendants' officers and di-
rectors realized substantial personal profits from
the sale of the stock in the defendant corporation."
259 F.Supp. at 682.

3/ In Mason, Moran & Co, supra a manager was involved; there
was evidence that he had full knowledge and actively participated
in the fraudulent scheme.

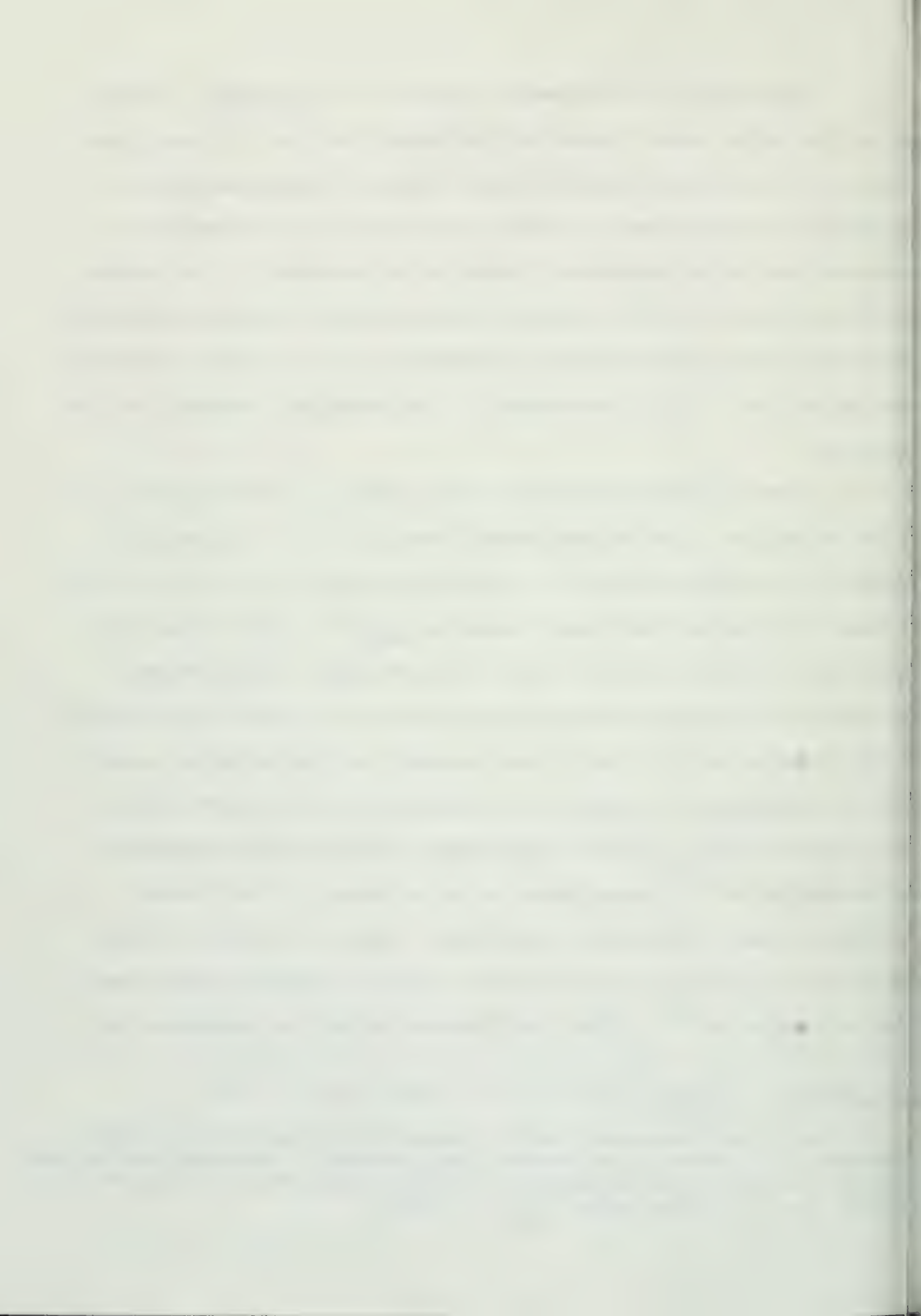


The kind of involvement referred to in Brennan, supra, and in the other cases cited by the Respondent are in sharp contrast to the actions taken by Reigel herein. Reigel merely arranged for the purchase of shares by his employer pursuant to instructions by his employer. There is no evidence in the record which would indicate that Reigel had anything to gain by the consummation of the purchase by his employer, nor is there evidence that Reigel had "guilty knowledge of the wrongful purpose" of his employer.

Although the Respondent cites cases to indicate that it is not necessary that an individual know that his actions are unlawful to establish wilful violations, (Resp. Br. p. 19, n. 25) it should be noted that these cases do not deal with aiding and abetting, but are cases in which the individual has performed the specific acts proscribed by the statute, so that the elements of the offense were in each case present; but in order to establish the elements of aiding and abetting, it is necessary that the individual have "guilty knowledge of the wrongful purpose of the perpetrator".^{24/} Here there is no evidence in the record that Reigel had such guilty knowledge. There is evidence which indicates that he believed that the stock in question was exempt from registration.^{25/} Since "guilty knowledge" is necessary in a

^{24/} People v. Flores, CA 2d Crim. 15501, Feb. 14, 1969.

^{25/} Evidence was introduced which showed that appellant had been informed in a letter from Kaufman that Kaufman's attorney had advised that the shares would be exempt from SEC registration. Division's Exhibit No. 3, letter dated Sept. 9, 1963 .

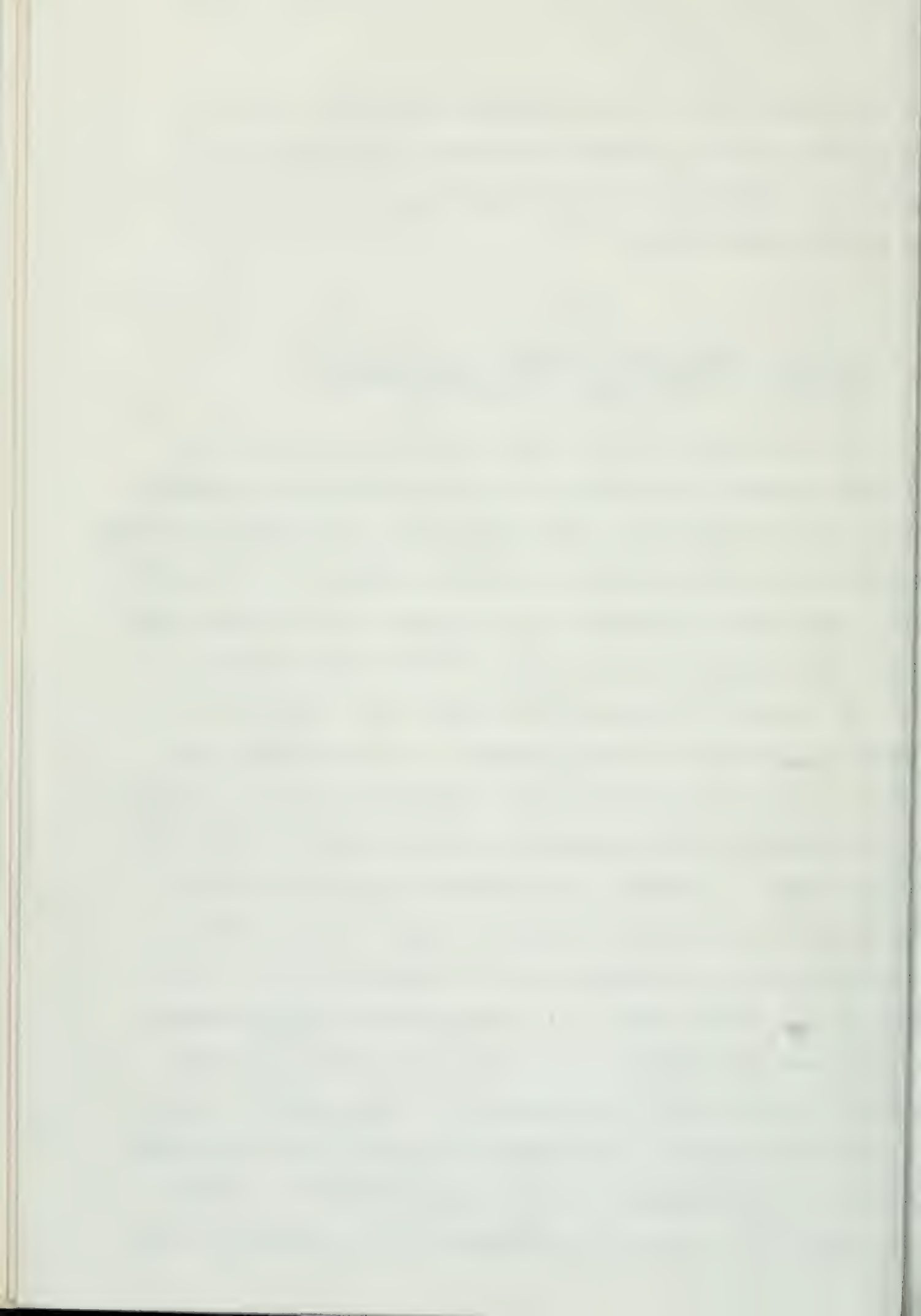


common law crime such as that considered in Flores, supra, (forgery) it would seem axiomatic that such knowledge would be necessary in a technical statutory regulation, such as that involved in the instant case.

VIII

REPLY TO COMMISSION'S ASSERTION THAT REIGEL WILFULLY VIOLATED ANTI-FRAUD PROVISIONS IN THE SALE OF REGISTERED JAYARK STOCK.

The Respondent asserts that the predictions made by Reigel with respect to the future of Jayark stock had no reasonable basis since Reigel knew very little about the prospective deal being negotiated between Jayark and Goldwyn (Resp. Br. p. 14, 15). However, Respondent only points in the record to a statement made by Colton that the salesmen were not told that the deal was closed. Of course the deal would not have been "closed" until the papers were actually signed. However, to contend that the fact that serious negotiations were in progress was not a relevant factor in estimating the prospects of Jayark stock is far-fetched to say the least. Indeed, it is arguable that it would be a breach of duty on the part of Reigel to fail to report such a significant fact to his customers. The Commission points to no evidence in the record where it is stated that the only information Reigel had with regard to the negotiations was that they were taking place. Unless the Commission is implying that Reigel had no other information, from Reigel's failure to take the stand and testify, it is difficult to see how the Commission reached its conclusion. Of course, the Commission has strenuously main-



ained that notwithstanding the improper inference drawn by the
aring Examiner from Reigel's failure to testify (R. 1691), it
ompletely excised that inference from the record in drawing its
onclusions (R. 2009).

The Respondent cannot refute the admission by Mrs. B.
a cross-examination that the predictions made by Reigel were
expressly made conditional on the acquisition of the film
library (R. 152); merely because in her prior testimony she had
not indicated that those predictions had been conditioned. Mrs. B.
was not asked whether Reigel's statements were conditional on
direct examination. Of course, an important purpose of cross-
examination is to clarify and explain testimony given on direct
which may be misleading. In this instance Mrs. B's cross-examination
fully served that purpose.

The Respondent makes much of testimony in the record
indicating that Reigel was not told whether the "deal was closed".
(Resp. Br. pp. 14, 15.) However, it must be pointed out that
there is no evidence in the record that Mr. Reigel ever told his
customers that an agreement had been consummated. It is self-
evident that until an agreement is consummated, one of the parties
can always refuse to agree. All that a reasonable person can do
is to attempt to evaluate the possibilities of final consummation
taking place. Mr. Goldstone's testimony indicates that the pos-
sibilities were excellent. (R. 497, 498, 499, 500).

The Respondent argues the predictions of a substantial
increase in the price of a speculative securities within a
relatively short period of time are inherently fraudulent and
cannot be justified (Resp. Br. p. 16). However, as Reigel

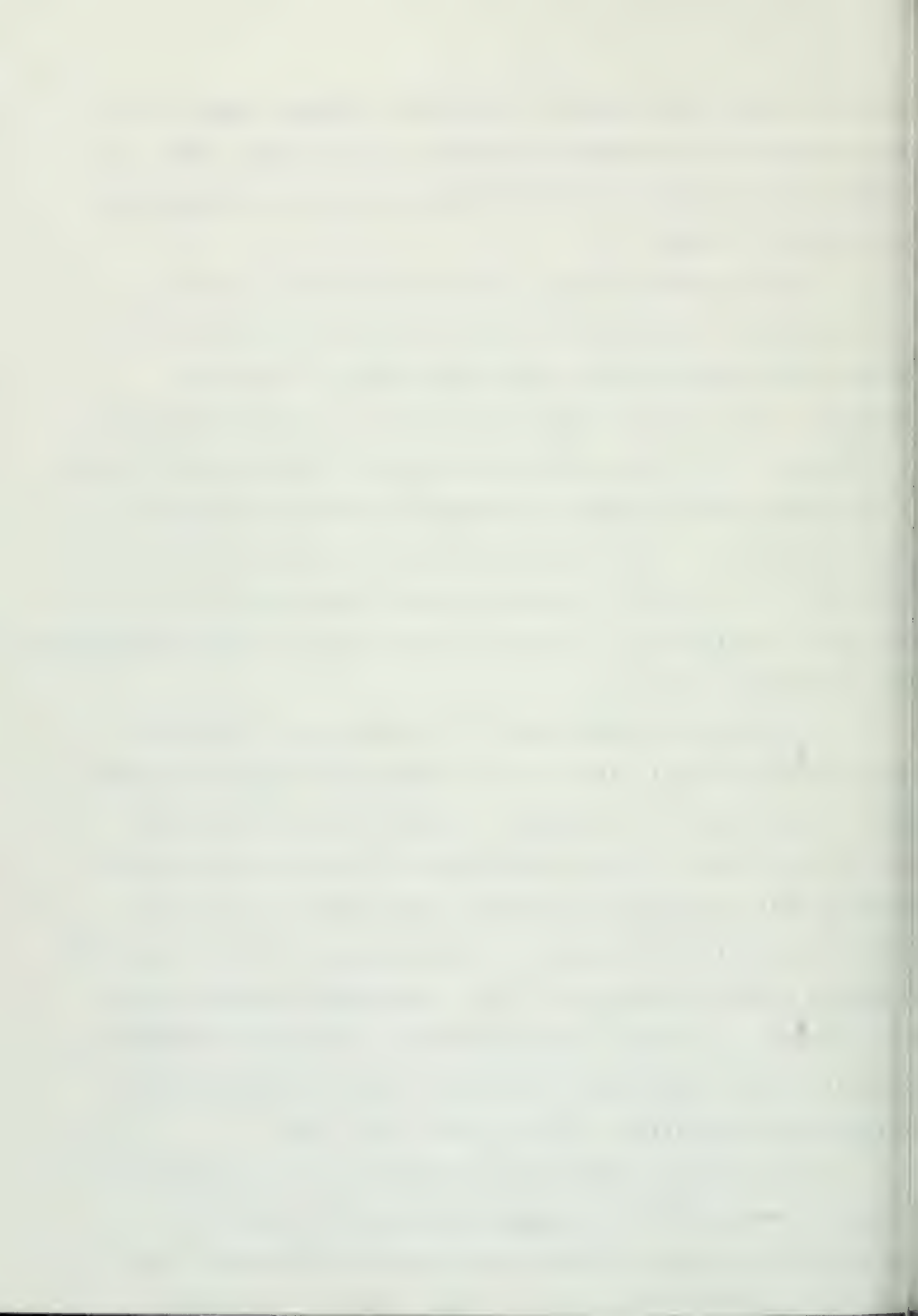


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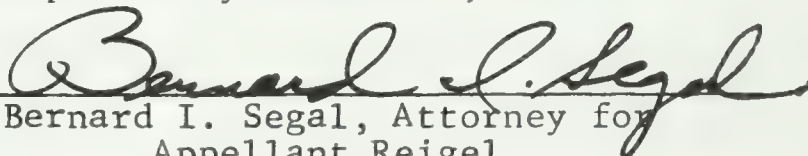
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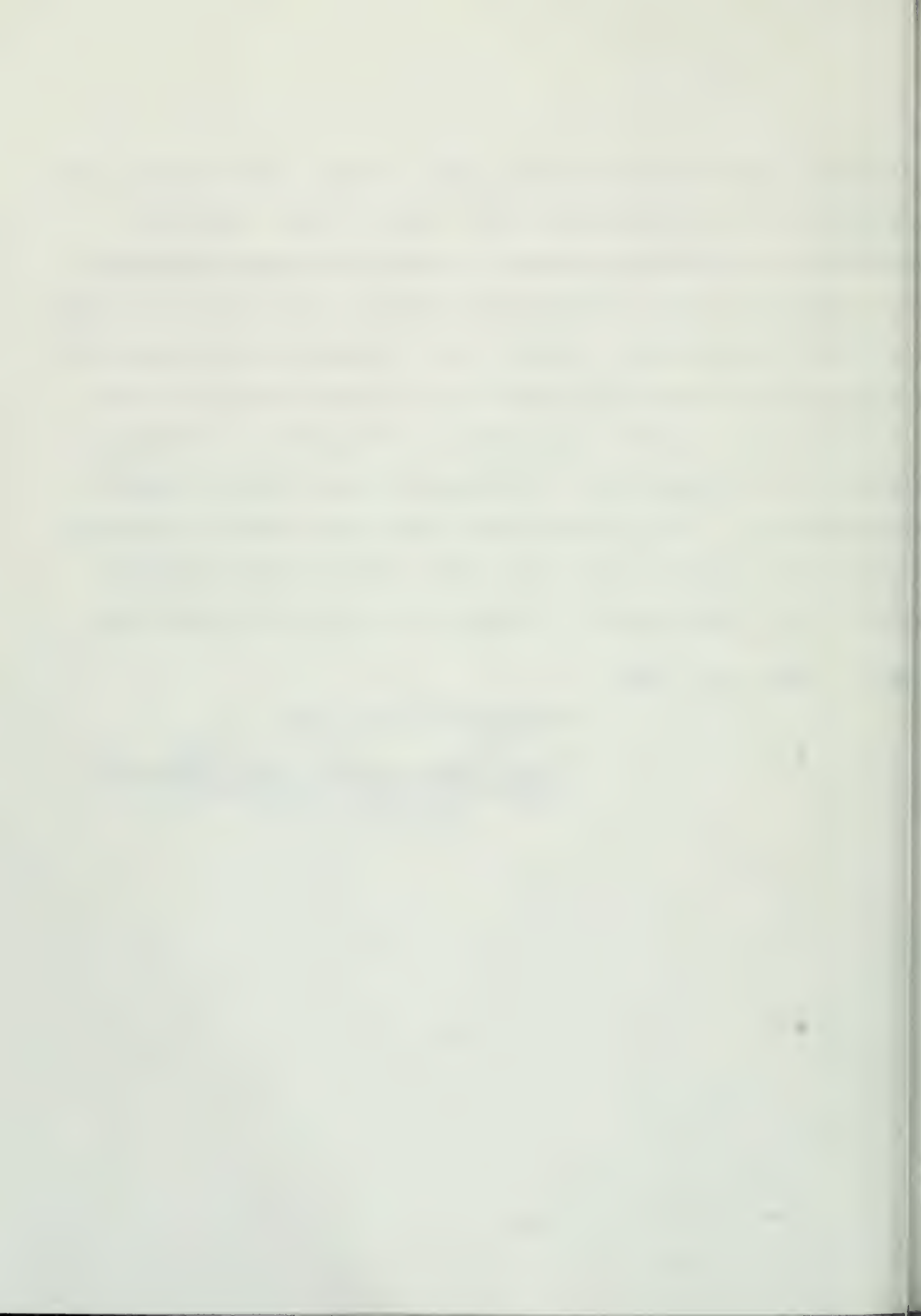


indicated in his Opening Brief (p. 46), all the cases cited by the respondent for this proposition were cases in which there was overwhelming independent evidence to support the unreasonableness of the prediction, and, independent findings as to the unreasonableness of the predictions. Therefore the language in the cases cited were dicta and even this dicta has not been repeated in a Federal Court case since all the citations offered were to Orders or releases of the Commission. As discussed more fully in Reigel's Opening Brief (p. 47) the one Federal Court case which the Hearing Examiner cited for the same proposition actually upheld Reigel's position that there can be a rational basis for such predictions.

DATED: March 10, 1969.

Respectfully submitted,


Bernard I. Segal, Attorney for
Appellant Reigel



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM REIGEL,

Appellant,

-vs-

SECURITIES AND EXCHANGE
COMMISSION,

Respondent

No. 22459

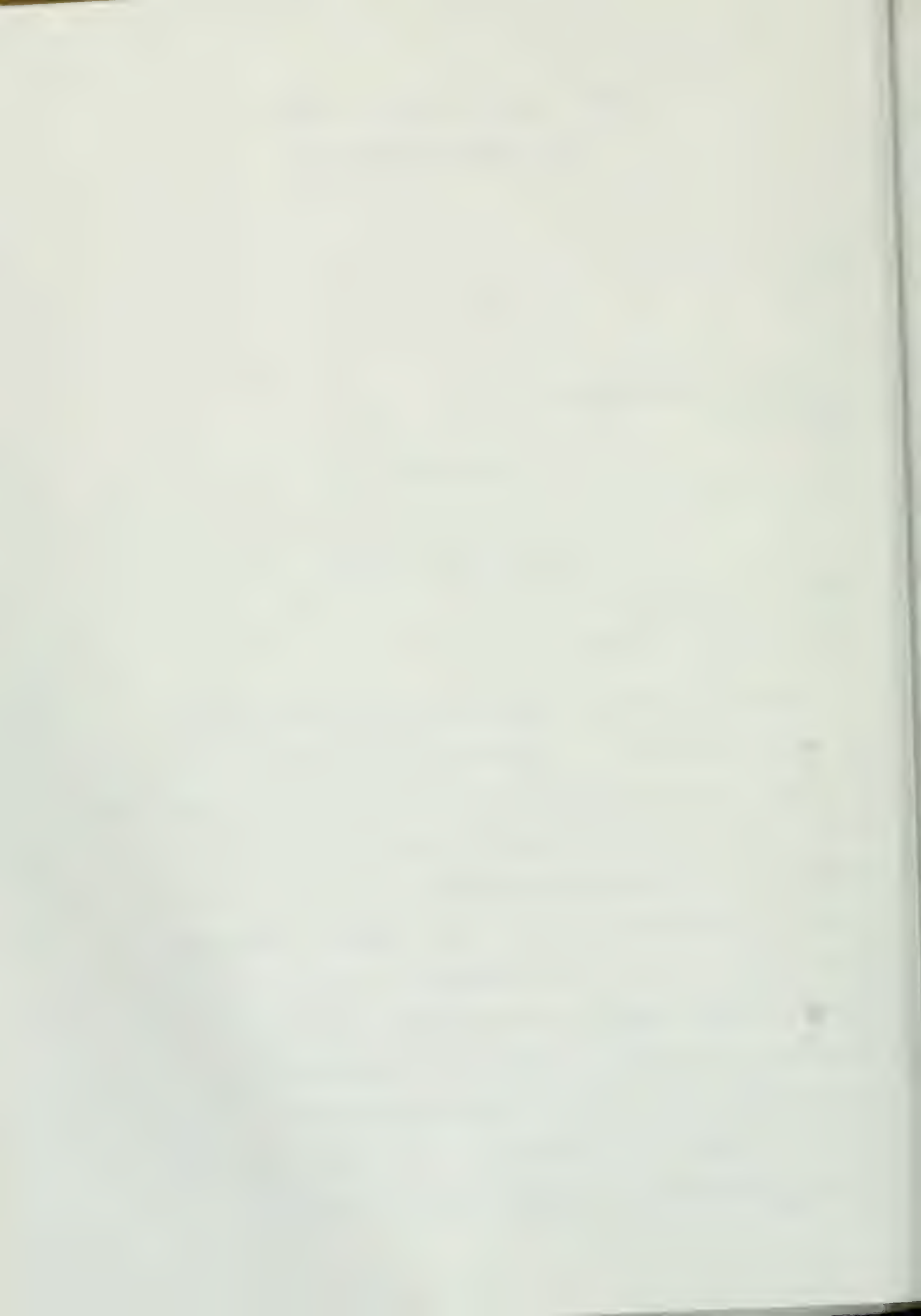
AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)

) ss

COUNTY OF LOS ANGELES)

ELSIE R. STIVERS, being first duly sworn, deposes and says that she is a secretary in the office of Bernard I. Segal, attorney at Law; that on March / / , 1969, she served the attached Appellant's Reply Brief on the persons named below, by placing a copy thereof in an envelope properly addressed to them at their address appearing under their names, which addresses are the last addresses of said persons known to her, and the envelope containing sufficient government postage was deposited by her in the United States mail at 5670 Wilshire Boulevard, Los Angeles California 90036, for delivery by the United States Post Office Department as directed by said envelope.



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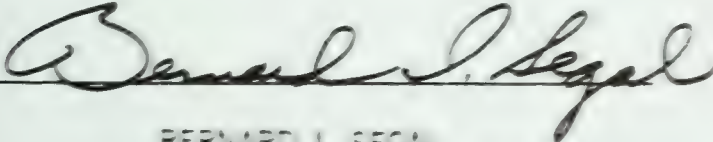
Donald M. Feuerstein
David Ferber
Securities and Exchange Commission
Washington, D. C. 20549

DATED: March 11, 1969



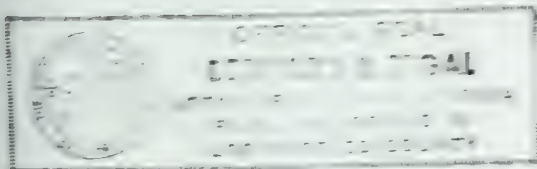
Elsie R. Stivers

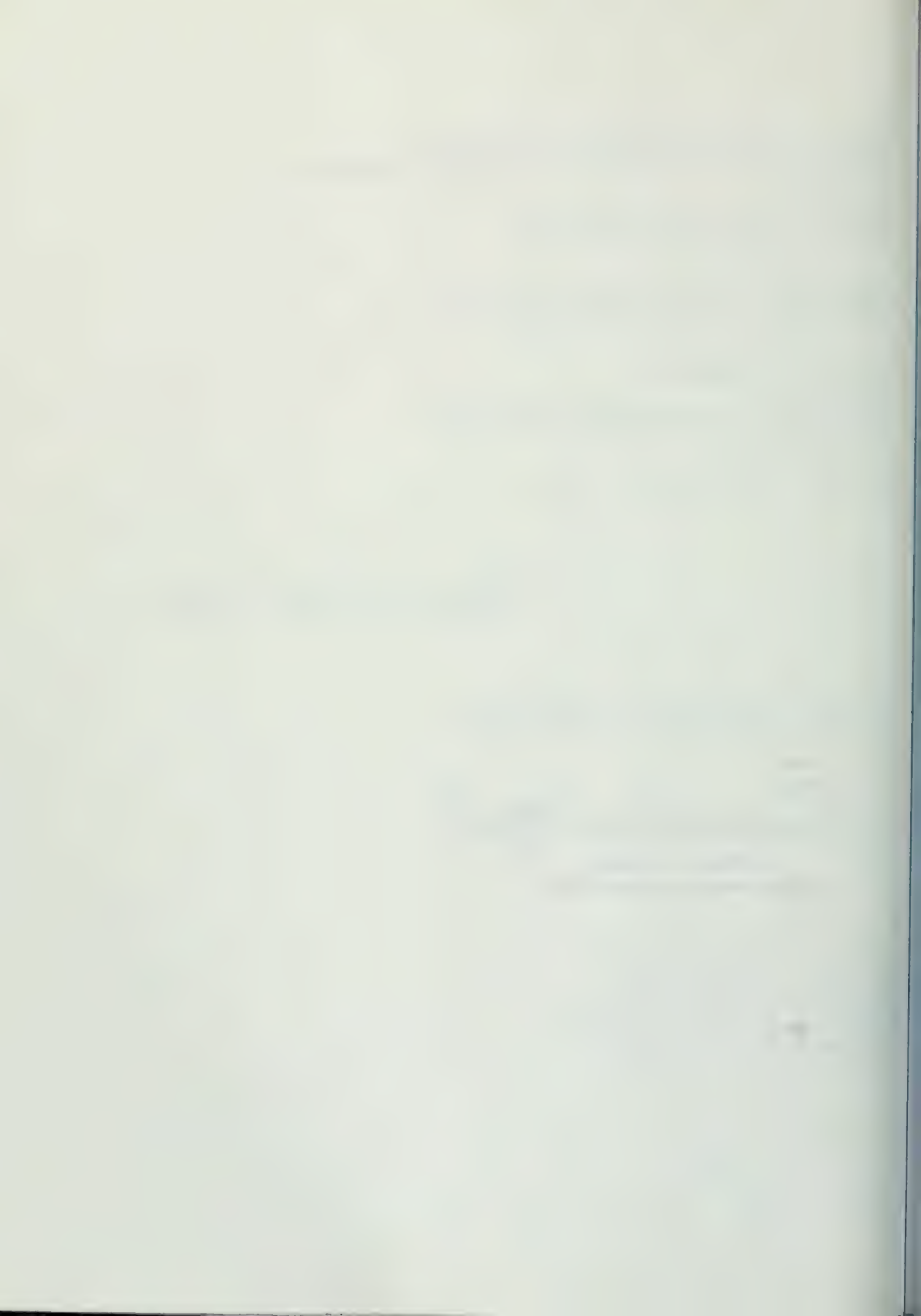
Subscribed and sworn to before
me this 11 day of March, 1969.



BERNARD I. SEGAL

My Commission Expires Dec. 28, 1969





UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 24 1969

WILLIAM REIGEL,

Appellant

-vs-

No. 22459

SECURITIES and EXCHANGE
COMMISSION,

Respondent.

APPELLANT'S OPENING BRIEF

FILED

DEC 18 1968

WM. B. LUCK, CLERK

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4 UNITED STATES COURT OF APPEALS
5 FOR THE NINTH CIRCUIT
6

7 WILLIAM REIGEL,

8 Appellant,

9 -vs-

10 SECURITIES and EXCHANGE
11 COMMISSION,

12 Respondent.
13

No. 22459

14 APPELLANT'S OPENING BRIEF
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INDEX

| | Page |
|---|------|
| Citations | i |
| Statement of Issues Presented for Review | 1 |
| Statement of the Case | 2 |
| A) Nature of the case and course of prior proceedings. | 2 |
| B) Facts | 9 |
| ARGUMENT | |
| I. Procedural Irregularities | 13 |
| A) Improper inference drawn from failure to testify | 13 |
| B) Excessive, arbitrary and capricious penalty | 21 |
| C) Improper education of witness | 24 |
| D) Admission and reliance on hearsay | 26 |
| E) Lack of Counsel | 28 |
| II. Lack of evidence to support charge of willful sale of unregistered securities | 31 |
| A. No sale of unregistered securities | 31 |
| B. Conduct with respect to unregis- tered securities not willful | 32 |
| III. Insufficient evidence to show violation of securities act for failure to in- form customers of financial condition | 38 |
| IV. Insufficient evidence to support conclusion that no reasonable basis for predictions | 41 |
| CONCLUSION | 49 |

CITATIONS

CASES

Page

| | |
|--|--------|
| <u>Assurance Investment Co., SEA Rel. No. 7862</u> <u>(April 15, 1966) p. 2</u> | 33 |
| <u>Barnett v. U.S., 319 F.2d 340, 344</u> <u>(C.A.8, 1963)</u> | 8 |
| <u>Elder v. Board of Medical Examiners</u> <u>241 CA 2d 246, 50 Cal.Rptr. 304 (1966)</u> <u>Cert.den.385 U.S. 1001</u> | 19, 23 |
| <u>Elfbrandt v. Russell, 384 U.S. 11 (1966)</u> | 19, 22 |
| <u>Garrity v. New Jersey, 385 U.S. 493 (1967)</u> | 19, 22 |
| <u>Gilligan, Will & Co., 38 SEC 388, 396 (1958)</u> <u>aff'd 267 F. 2d 461 (C.A.2 1959)</u> <u>Cert. den. 361 U.S. 896</u> | 33 |
| <u>Griffin v. California, 380 U.S. 609 (1965)</u> | 17 |
| <u>Hughes v. SEC 147 F. 2d 969, 977</u> <u>(CADC 1949).</u> | 34 |
| <u>Konigsberg v. State Bar, 353 U.S.252,267 (1957)</u> | 19, 22 |
| <u>Miranda v. Arizona, 384 U.S. 436 (1966)</u> | 29 |
| <u>Otis and Company v. SEC, 106 F.2d 579, 582</u> <u>(1939 6th Cir.)</u> | 38 |
| <u>People v. One 1960 Cadillac Coupe</u> <u>62 Cal. 2d 92, 396 P. 2d 706 (1964)</u> | 19, 23 |
| <u>Morris J. Reiter, SEA Rel No. 6849 (July 13,1962)</u> | 33 |
| <u>Henry P. Rosenfeld, 32 SEC 731, 739, 740 (1951)</u> | 35 |
| <u>Schuck v. SEC, 264 F. 2d 358, 363 (CADC 1958)</u> | 34 |
| <u>Schware v. Board of Bar Examiners, 353 U.S.</u> <u>232, 249 (1956)</u> | 19, 23 |
| <u>SEC v. Culpepper, 270 F. 2d 241 (CA 2 1959)</u> | 33, 34 |
| <u>SEC v. Johns, 207 F. Supp. 566 (USDC D</u> <u>New Jersey, July 25, 1962)</u> | 48 |

| CASE | PAGE |
|--|------------|
| 1 <u>Shively v. Stewart</u> , 65 Cal. 2d 475, 421 P. 2d 65 (1967) | 19, 20, 23 |
| 2 <u>N. Sims Organ and Co. Inc.</u> 40 SEC 573, 577 3 (1961) aff'd 293 F. 2d 78, 81 (C.A.2, 1961), cert. den. 368 U.S. 968 | 18 |
| 4 <u>Spevack v. Klein</u> , 385 U.S. 511, 515 (1967) | 17,22,24 |
| 5 <u>Thompson Ross Securities Co.</u> , 6 SEC 1111, 1112 | 34 |
| 6 <u>Trussell v. United Underwriters Ltd.</u> , 7 228 F. Supp. 757, (USDC Colo.1964) at p. 762 | 38 |
| 8 <u>Utica Observer Dispatch, Inc. v. NLRB</u> 229 F. 2d 575, 577 (1956) | 21 |
| 9 <u>U.S. v. Costello</u> , 365 U.S. 265 (1961) | 18, 19 |
| 10 <u>Underhill Securities Corp. SEA Rel. 7668</u> 11 (Aug. 3, 1965) | 35 |
| 12 <u>Willapoint Oysters, Inc. v. Ewing</u> , 174 F. 2d 13 676, 691 (9th Cir. 1949) | 27 |
| 14 <u>Wilson v. U.S.</u> , 149 U.S. 60 (1893) | 17 |

1 STATEMENT OF ISSUES PRESENTED FOR REVIEW

2

3 1. Was the inference of guilt drawn by the Hearing
4 Examiner from Reigel's failure to testify improper, thereby
5 tainting the record?

6 2. Did the imposition of a penalty by the Commission
7 far in excess of that which the Hearing Examiner assessed
8 indicate that the record failed to reflect accurately the sub-
9 stance of the transactions, or that there was a complete lack
10 of standards as to the penalties that prohibited conduct
11 calls for?

12 3. Were the witnesses for the Division improperly
13 educated by an Agent of the Division prior to their testimony?

14 4. Was the record tainted by the admission and re-
15 liance on incompetent hearsay evidence?

16 5. Did the fact that Reigel was without counsel at
17 a crucial point in the proceedings, the Hearing, multiply the
18 impact of other procedural infirmities and interfere with the
19 compilation of a record which accurately reflected the facts?

20 6. Was there sufficient evidence in the record to
21 support a finding that Reigel wilfully sold unregistered
22 securities?

23 7. Was there sufficient evidence to support the
24 conclusion that there ~~was~~ no reasonable basis for the pre-
25 dictions made by Reigel as to the future of Jayark stock?
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1 pended from being associated with a Broker-Dealer for 45 days,
2 and accordingly, Desbrow ceased to be a party to the pro-
3 ceedings.

4 The Order for Hearing was served on Reigel pursuant
5 to the request of the Division of Trading and Markets (the
6 Division). Reigel filed an answer pro se. Hearing Examiner,
7 Sidney Gross, under the provisions of Rule 8(b) of the
8 Commission's Rules of Practice, held a prehearing conference
9 on August 5, 1965, at Los Angeles, California. Reigel attended
10 that conference.

11 Hearings were held at Los Angeles, California, on
12 August 9, 25-27, 1965, before Sidney Gross, Hearing Examiner.
13 Reigel appeared at the hearings, pro se. The Division of
14 Trading and Markets appeared by Arthur W. Fred, Attorney.

15 On October 7, 1965, the "Proposed Findings, Conclusions
16 and Brief on Behalf of the Division of Trading and Markets"
17 was filed. On ~~December~~ 20, 1965, the "Opposition to Proposed
18 Findings, Conclusions and Brief on Behalf of the Division of
19 Trading and Markets, and Proposed Findings, Conclusions and
20 Brief on Behalf of Respondents William Reigel, Pierre Pambrun
21 and Jay B. Cook" was filed. The "Reply by the Division of
22 Trading and Markets to Opposition to Proposed Findings,
23 Conclusions and Brief on Behalf of the Division of Trading
24 and Markets and Proposed Findings, Conclusions and Brief on
25 Behalf of Respondents William Reigel, Pierre Pambrun and Jay
26 B. Cook" was filed on January 6, 1966.

1 On February 14, 1966, the Hearing was re-opened to
2 hear additional testimony concerning the charges against Nees,
3 who had alleged that he was not served with notice of the first
4 hearing. On March 30, 1966, the "Proposed Findings and Conclu-
5 sions Submitted on Behalf of Robert Nees" were filed. A Supple-
6 mental Brief for Appellants Reigel, Pambrun and Cook was filed
7 on April 5, 1966. The "Reply by Division of Trading and Markets
8 to Proposed Findings and Conclusions Submitted on Behalf of
9 Respondent Robert W. Nees" was filed on April 21, 1966. (The
10 Division, in its April 21, 1966 brief, acknowledged that it had
11 made no proposed findings that any of the "individual respond-
12 ents" sold unregistered shares of Kramer-American Stock, R.1638).

13 The Initial Decision of the Hearing Examiner was
14 dated August 26, 1966. The Hearing Examiner concluded inter
15 alia that Appellant Reigel willfully violated Sections 5(a)
16 and 5(c) of the Securities Act of 1933 by the sale and delivery
17 of unregistered Jayark stock. (R.1680). The Hearing Examiner
18 found that Appellant Reigel, in the offer and sale of Jayark
19 stock, willfully violated Sections 17(a) of the Securities Act
20 and Sections 10(b) and 15(c)(1) of the Exchange Act, and Rules
21 10B-5 and 15C-1-2 (R.1701, 1702). (It should be noted that
22 the Jayark stock referred to here was registered, and was not
23 the same stock that allegedly had been sold without a
24 registration statement.

25 The record shows that at the time of the hearing
26 Fred Colton informed the Hearing Examiner that Reigel

1 and other of the Respondents didn't want to testify because
2 the Hearing Examiner had allowed inquiry into areas outside
3 the scope of the charges in questions asked of Mr. Colton
4 prior to the time Reigel and the others decided not to testify.
5 (R. 519). The line of questioning specifically covered prior
6 associations with broker-dealers who had been disciplined
7 (R. 469). The Hearing Examiner reserved ruling on the objec-
8 tion and allowed the questions (R. 469). In his Initial
9 Decision, the Hearing Examiner concluded that the objection to
10 these questions was well taken (R. 1696, n. 48). Nevertheless,
11 the Hearing Examiner, in his Initial Decision, stated that he
12 inferred from Reigel's failure to testify that his testimony
13 would have been adverse (R. 1691).

14 The Hearing Examiner concluded that Reigel should be
15 suspended from being associated with a dealer for six months,
16 the registration of Century Securities should be revoked,
17 and that it should be expelled from N.A.S.D. The Registrant's
18 partners, Colton and Fleischman, were to be barred from being
19 associated with a broker or a dealer with the proviso that after
20 one year they could apply to become associated with a registered
21 broker-dealer in a non-supervisory capacity. Salesman Nees
22 was barred from being associated with a broker-dealer, and
23 salesman Pambrun was censured (R. 1703).

24 The Commission determined on its own Motion to review
25 the Initial Decision, and accordingly an Order for Review of
26 the Initial Decision was entered October 3, 1966 (R. 1754).

1 The "Brief on Behalf of the Division of Trading and Markets
2 in Support of Exceptions to the Initial Decision" was filed
3 on October 31, 1966. The "Brief on Behalf of Respondent Jay
4 B. Cook in Opposition to Brief of the Division of Trading
5 and Markets filed October 31, 1966" was filed on December 1,
6 1966. Reigel, in propria persona, joined in said Brief of
7 Jay Cook by a document dated December 1, 1966 (R. 1882). The
8 "Findings and Opinion of the Commission" were entered on
9 July 14, 1967. The Commission found that the Registrant, and
10 the salesmen, (including Reigel) "willfully violated the anti-
11 fraud provisions of Section 17(a) of the Securities Act of
12 1933, and Sections 10(b) and 15(c)(1) of the Exchange Act
13 and Rules 17 CFR 240.10.b-5 and 15c-2 thereunder, in that
14 they engaged in a scheme to defraud in the offer and sale of
15 securities (R. 2001). The Registrant was found to have
16 violated Section 5(a) and (c) of the Securities Act, and
17 Reigel was found to have willfully participated in such viola-
18 tions with respect to the sale of unregistered Jayark shares
19 (R.2007, 2008).

20 The Commission, as distinguished from the Hearing
21 Examiner, concluded that the broker-dealer registration of
22 Century Securities should be revoked, and that the partners
23 and the salesmen should all be barred permanently from being
24 associated with a broker-dealer (R. 2011).

25 A "Petition for Rehearing of Review of Initial Deci-
26 sion of Hearing Examiner by Respondent William Reigel" was

1 filed on August 21, 1967. A Memorandum Opinion and Order
2 Denying Rehearing was entered on November 1, 1967 (R. 2013).

3 A "Statement of Points to be Relied Upon in Petition
4 for Review" was filed February 21, 1968, by Appellant Reigel.
5

6 B. FACTS

7 The Registrant, Century Securities, was a broker-
8 dealer registered with the Securities and Exchange Commission
9 on June 16, 1960. (Stipulation, pre-hearing conference, page
10 14, vol. 1 Transcript of Record). William Reigel, Robert
11 Nees, Pierre Pambrun, Jay B. Cook, Donald Brophy, and John
12 Desbrow were registered sales representatives in the employ
13 of the Registrant at the time, or times, pertinent to the
14 proceedings (Ibid.)

15 Registrant used the mails and means and instrument-
16 alities of Interstate Commerce while engaged in the trans-
17 actions alleged in the Order for Proceedings, and effected
18 transactions otherwise than on a National Securities Exchange
19 (Ibid.)

20 In order to avoid confusion it must be noted that
21 Reigel has been found to have engaged in two separate
22 violations with respect to Jayark stock:

23 (1) The sale of unregistered Jayark shares.

24 (2) Misrepresentations with respect to the sale of
25 other shares of Jayark stock which were properly registered.
26

1 1. With regard to the sale of unregistered
2 securities:

3 The Division of Trading and Markets acknowledged in
4 its Brief of April 21, 1966, that it had made no proposed
5 findings that any of the "individual respondents" had sold
6 unregistered shares of Kramer-American stock (R. 1638).
7 Neither the Initial Decision of the Hearing Examiner, nor
8 the Findings of the Commission indicate that Reigel, or any
9 of the other salesmen sold unregistered shares of Kramer-
10 American stock, and, accordingly, the Kramer-American trans-
11 actions are not in issue as regards the salesmen, including
12 Reigel.

13 At all pertinent times Reuben R. Kaufman was the
14 President and a Director of Jayark Films Corporation, and
15 Jane Kaufman, his wife, was Secretary and a Director. On
16 September 4, 1964, the Registrant purchased as principal
17 3,750 shares of Jayark stock at 5½ (Stipulation, pre-hearing
18 conference, page 14, vol. 1). On September 14, 1964, Regis-
19 trant received certificates for 3,750 shares of Jayark,
20 of which 3,000 were registered in the name of Jane Kaufman,
21 and 750 shares in the name of Reuben Kaufman. These certifi-
22 cates were issued to the Kaufmans by transfer from larger
23 certificates, which were originally issued to and directly
24 acquired by the Kaufmans from the issuant and were not
25 covered by any filing under the Securities Act (Ibid.)
26 "Registrant was an underwriter of Jayark stock earlier in the

1 same year at which time there was no question as to the
2 propriety of the issue." (Initial Decision, page 29, R. 1698).
3 Reigel was the addressee of some, but not most, of the corres-
4 pondence from the Kaufmans with regard to the purchase of
5 Jayark stock by Century Securities (R. 459, 460). In a letter
6 dated September 9, 1963, from Reuben Kaufman to Reigel,
7 Kaufman stated that the shares in question were exempt from
8 registration and that his conclusion was based on the legal
9 opinion of his attorney (Division's Exhibit No. 3). Registrant
10 wrote Kaufman on October 29, 1964, requesting a copy of
11 Kaufman's attorney's opinion with regard to the Jayark exemp-
12 tion (Respondent's Exhibit C). The opinion, dated May 23,
13 1963, was mailed to Registrant on November 2, 1964. (Respond-
14 ent's Exhibit C). Kaufman's attorney had relied on Rule 53
15 under the Securities Act as a basis for exemption of the
16 shares (Ibid.).

17 From September 4 to September 11, 1963, Registrant,
18 as principal, through its sales representatives, sold 2,320
19 shares of Jayark stock short to the public. This short posi-
20 tion was covered by the shares acquired from Kaufman. The
21 balance of the stock purchased from Kaufman was sold to the
22 public in small lots by certain of Registrant's sales repre-
23 sentatives (Stipulation, page 15, pre-hearing conference, as
24 corrected, Transcript of Record, vol. 1, page 9). However,
25 sales representative Reigel did not sell any of the unregistered
26 shares of Jayark (R. 2008).

1 Investigator Hiller testified that Appellant Reigel
2 had told him that he was the Sales Manager of Century Securi-
3 ties (R. 524). However, Hiller later testified that his
4 examination of the books at Century Securities did not cor-
5 roborate that statement, but, instead, showed that Reigel
6 received no extra compensation beyond his earnings as a
7 salesman (R. 525). Fred Colton, one of the partners of
8 Century Securities, testified that Reigel held no special
9 position with the company, and was a salesman like all the
10 rest (R. 458).

11 2. With respect to misrepresentations allegedly
12 made pursuant to the sale of registered shares of Jayark
13 stock:

14 The Commission concluded that Reigel and the other
15 Respondents had no adequate basis for their optimistic
16 representations and predictions as to the future of Jayark
17 (R. 2003).

18 Reigel made predictions as to a future rise in the
19 price of Jayark stock if the acquisition of a film library
20 was completed (R. 152). These predictions were made to
21 two witnesses: Mrs. Breslin (Mrs. B) and Mrs. deBiexedon
22 (Mrs. deB).

23 Mr. Goldstone, who was a consultant to Jayark Films,
24 testified that negotiations for the Samuel Goldwyn film
25 library were conducted and that an agreement was reached
26 with Mr. Goldwyn for the distribution rights to those films

1 (R. 498). Goldstone further testified that adequate financing
2 had been committed by Walter Heller Company to Goldwyn
3 (R. 500, 501). A letter from George Slaff, Goldwyn's at-
4 torney, to the SEC indicated that the Goldwyn negotiations
5 lasted from the first part of May to the end of June, 1963,
6 (Division's Exhibit No. 25), however, the testimony of
7 Goldstone indicated that the negotiations lasted over a
8 longer period (R. 517).

9 Mrs. B. and Mrs. deB testified for the Division with
10 regard to representations allegedly made by Reigel to
11 them in conjunction with their purchase of Jayark shares.
12 Confirmation of Mrs. deB purchase was dated June 6, 1963
13 (R. 157) and confirmation of Mrs. B's purchase was dated
14 June 12, 1963 (R. 140). Both witnesses testified that they
15 contacted Reigel to ask him about Jayark stock (R. 140, 156).
16 Mrs. B stated that Reigel had told her that Jayark was
17 about to merge with a television company with a backlog of
18 pictures and the stock would go "sky high", "at least triple"
19 (R. 140). Mrs. B further stated that in response to her
20 inquiry as to the financial status of Jayark, Reigel had
21 stated that it was "perfect" (R. 152). Mrs. deB said that
22 she told Reigel that she didn't want to leave money in
23 something for a long period of time but wanted a stock that
24 would double in six months, and that Reigel suggested
25 Jayark (R. 157). Mrs. B later agreed that Reigel had
26 predicted that the price of Jayark would rise if the film

1 library was acquired (R. 152).

2 Investigator Hiller testified that he had seen every
3 witness who testified "before he took the stand" and that
4 his earlier memorandums of interviews were shown to them
5 and that these memorandums contained notations other than
6 those which he had put on them at the time of the interview
7 (R. 530, 531).

8 There was evidence that the adverse financial condi-
9 tion of Jayark was communicated to the two witnesses after
10 their purchase of the shares (R. 148, 163, 164), but that
11 neither witness attempted to rescind or cancel her sale
12 after receiving the information (R. 153, 160).
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1 that it disregarded all of the findings of the Hearing Ex-
2 aminer. Indeed, it would seem impossible for the Commission
3 to do so, since the Initial Decision of the Hearing Examiner
4 is a part of the record reviewed by the Commission, and be-
5 cause it would be very difficult for the Commission to make
6 independent findings on many points, particularly with
7 respect to the credibility of witnesses, since the Commission
8 did not have an opportunity to observe their demeanor.

9 The inference of guilt drawn by the Hearing Examiner
10 was improper on several grounds. Firstly, the inference was
11 improper because the basis of the inference, the failure of
12 Reigel to testify, was induced in large part by the other
13 procedural error of the Hearing Examiner in allowing inquiry
14 into irrelevant and prejudicial areas. Therefore, the Hearing
15 Examiner is estopped from drawing an unfavorable inference.

16 The Division was allowed to inquire at great length
17 as to the number of companies for which Colton had worked
18 whose registrations had been revoked. When an objection was
19 made to such inquiries (R. 469, line 20, et seq), the Hearing
20 Examiner stated that he would reserve his ruling and allowed
21 the questions to continue.

22 The Hearing Examiner, so far as the transcript reveals,
23 never in fact ruled on this point during the hearing. However,
24 in his Initial Decision (R. 1696, n. 48) the Hearing Examiner
25 not only found that the inquiry was irrelevant under case
26 law, but acknowledged the unfairness of the inquiry since it



1 required Colton to meet, without notice, charges of additional
2 violations. Reigel, being without counsel, did not understand
3 the significance of the Hearing Examiner's decision to "re-
4 serve decision". However, he did recognize the unfairness of
5 the questions (the unfairness which was belatedly recognized
6 by the Hearing Examiner, R 1696, n. 48) and therefore, not
7 wishing to have his own defense sidetracked by inquiry into
8 alleged violations which he had not been charged with, and
9 was therefore not prepared to respond to, he decided not
10 to testify. 1/

11 The Hearing Examiner who was advised of the reason
12 that Reigel did not desire to testify (R 519) did not
13 attempt to explain that if the evidence was later found to
14 be irrelevant it would be disregarded, nor did he at this
15 point explain that he would draw an adverse inference from
16 Reigel's failure to testify. Instead, he impatiently stated
17 that:

18 "They either want to take the stand or
19 they don't." (R. 518).

20 Reigel was, therefore, in the unenviable position of having
21 to decide whether to take the stand and be subject to in-
22 quiry which the Hearing Examiner later determined to be un-
23 fair and irrelevant, without the aid of counsel,

24 1/ "Mr. Colton: The respondents are reluctant
25 to take the stand, because yesterday when
26 Mr. Fred was questioning me, a great many
of his questions were outside of the scope
. . . covered by the charges..." (R. 519)



1 and without the knowledge that if he failed to testify the
2 Hearing Examiner would deem that his entire testimony, had
3 it been given, would have been unfavorable to his case.

4 Under those circumstances, fairness would require that
5 the Hearing Examiner should be estopped from drawing an un-
6 favorable inference from Reigel's refusal to testify, or, at
7 the very least, should have had the affirmative responsibility
8 of notifying Reigel, prior to his decision not to testify,
9 that such an adverse inference would be drawn. The procedure
10 actually followed by the Hearing Examiner was so unfair as
11 to cast doubt upon whether the hearing could meet the basic
12 requirements of "fundamental fairness" required by due
13 process of law.

14 Furthermore, since the hearing Examiner's admitted
15 erroneous ruling (R.1696, n.48) was the proximate cause of
16 Reigel's failure to testify 2/the Commission is estopped to
17 deny that Reigel was in effect asserting his Constitutional
18 right to refuse to testify in response to an admittedly im-
19 proper line of questioning which he considered possibly
20 incriminating, and the Commission is estopped to demand of
21 Reigel, a lay witness, any more specific declaration of the
22 constitutional basis for his failure to testify. Therefore,
23 no inference can be drawn from his failure to testify.

25 2/ Ibid.



1 In Spevack v. Klein, a non-criminal disbarment proceeding,
2 where an attorney refused to testify at all on the ground that
3 his testimony might be incriminating, the United States
4 Supreme Court stated:

5 "In this context 'penalty' is not restricted
6 to fine or imprisonment. It means as we said
7 in Griffin v. California, 380 U.S. 609 (1965)
8 ...the imposition of any sanction which makes
9 assertion of the Fifth Amendment privilege
10 'costly' Id., at 614. We held in that case that
11 the Fifth Amendment operating through the
12 Fourteenth, 'forbids either comment by the
13 prosecution on the accused's silence or in-
14 structions by the court that such silence is
15 evidence of guilt.' Id, at 615..." [Emphasis
16 added].

17 Certainly, in the instant case, a substantial infer-
18 ence of guilt from Appellant's refusal to testify, as in
19 Spevack and in Griffin, supra, makes the assertion of the
20 privilege "more costly" and is clearly improper.

21 The Court in Griffin, supra, at page 609, further
22 explained its holding by quoting Wilson v. U.S., 149 U.S.60
23 (1893) which refers to 18 U.S.C. §3481; the court asserted
24 that the following language from Wilson is equally pertinent
25 to the basic Fifth Amendment right itself:

26 "...the Act was framed with a due regard also
27 to those who might prefer to rely upon the
28 presumption of innocence which the law gives
to every one, and not wish to be witness. It
is not every one who can safely venture on
the witness stand though entirely innocent of
the charge against him. Excessive timidity,
nervousness when facing others and attempting
to explain transactions of a suspicious char-
acter, and offenses charged against him, will
often confuse and embarrass him to such a



1 degree as to increase rather than remove
2 prejudices against him. It is not every one,
3 however honest, who would, therefore, willingly
4 be placed on the witness stand. The statute in
5 tenderness to the weakness of those who from
6 the causes mentioned might refuse to ask to be
7 a witness, particularly when they may have been
8 in some degree compromised by their association
9 with others, declares that the failure of the
10 defendant in a criminal action to request to
11 be a witness shall not create any presumption
12 against him." (149 U.S. p. 66).

13 It should be noted well that the above explanation is
14 particularly pertinent in the case at bar since Reigel
15 was not represented by counsel.

16 Since the Hearing Examiner is estopped to draw an
17 inference of guilt, and is also estopped to deny that Reigel
18 was asserting his Fifth Amendment right not to testify, the
19 cases cited by the Commission for the proposition that an
20 inference can be drawn from failure to testify in an adminis-
21 trative proceeding, 3/ are inapplicable. Indeed, the cases
22 themselves are doubtful authority today. In N. Sims Organ
23 and Company, supra, relied upon by the Commission (R. 2009),
24 the court referred to U. S. v. Costello, 365 U. S. 265 (1961)

25 3/ (R. 1691, 2009) N. Sims Organ and Company, Inc.,
26 40 SEC 573, 577 (1961) aff'd 293 F. 2d 78, 81 (C.A.2, 1961),
cert.denied, 368 U.S. 968; Barnett v. U. S. 319 F. 2d 340,
344 (C.A.8, 1963.)



1 in a footnote, acknowledging that Costello cast some doubt on
2 its holding. ^{4/} In Costello, the Court refused to validate
3 the inference of guilt drawn by the Appellate Court from the
4 Appellant's failure to testify. The Court, instead, found it
5 "unnecessary to decide in this case whether an inference may
6 be drawn in a denaturalization proceeding from the failure
7 of defendant to present himself as a witness." Id. at 278.
8 Also, the court indicated, evidently as a factor in failing
9 to decide the issue, that the improper inference had been
10 drawn, unlike in the instant case, by the Appellate Court,
11 not by the trial court. So in Costello there was no issue
12 of the trier of fact being influenced in its findings by an
13 improper inference. Therefore, the Court in Costello could
14 properly disregard any improper inference in reviewing the
15 record.

16 Recent cases have recognized that the right to engage
17 in a profession is a right of such significance as to require
18 the utmost protection from due process. Garrity v. New Jersey
19 385 U.S. 493 (1967); Spevack v. Klein, *supra*; Elfbrandt v.
20 Russell, 384 U.S. 11 (1966); Konigsberg v. State Bar of
21 California, 353 U. S. 252, 257 (1957); Schwartz v. Board of
22 Bar Examiners, 353 U. S. 232, 249 (1956); Shively v. Stewart
23 65 Cal. 2d 475, 421 P. 2d 65 (1966); Elder v. Board of Medical
24 Examiners, 241 Cal.App.2d 246, 50 Cal. Rptr. 304 (1966); People
25 v. One 1960 Cadillac Coupe, 62 Cal.2d 92, 396 P.2d 706 (1964).

26 ^{4/} 293 F 2d at 81.

1 cert. denied. 385 U.S. 1001. The California Supreme Court
2 stated in Shively v. Stewart, supra, at 480:

3 "A disciplinary proceeding has a punitive
4 character, for the agency can prohibit an
5 accused from practicing his profession . . .
6 Since the agency is the accuser, a party to
7 the proceeding, and ultimately makes a
8 decision on the record, its concentration
9 of functions calls for procedural safeguards...."

10 It is quite possible that because of the quasi-
11 criminal nature of these proceedings, an inference of guilt
12 from failure to take the stand would under any circumstances
13 be unconstitutional. However, regardless of whether that is
14 so, in the instant case the Hearing Examiner is estopped from
15 drawing such an inference of guilt and is estopped from deny-
16 ing that Reigel was asserting his right to refuse to answer
17 incriminating questions since it was the admittedly improper
18 action of the Hearing Examiner (R.1696,n.48) which induced
19 Reigel not to testify. (R. 519).
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1 B. The imposition of a penalty by the Commission
2 far in excess of that which the Hearing Examiner assessed
3 indicates that the record before the Commission may have
4 failed to reflect accurately the substance of the transac-
5 tions involved, and/or that the penalty was grossly excessive,
6 arbitrary and capricious.

7 The Hearing Examiner, who heard the witnesses testify,
8 found that the degree of Reigel's culpability was such that
9 the interests of the public would be protected by merely
10 suspending him from his profession for six months (R. 1704).
11 It should be kept in mind that this determination was made
12 even though the Hearing Examiner heard no testimony from
13 Reigel and relied upon an improper inference of guilt, which
14 was based upon Reigel's failure to testify. The Commission,
15 on the other hand, found that a complete bar from the
16 profession was indicated, even though they allegedly excised
17 this improper inference from the record, and did not consider
18 it in their decision. Such a disparity would seem to indicate
19 that from the vantage point of hearing the testimony of the
20 witnesses firsthand, the Hearing Examiner drew a quite dif-
21 ferent conclusion as to the seriousness of Reigel's conduct,
22 than did the Commission.

23 The Courts have long recognized the importance of the
24 Hearing Examiner's observations with respect to demeanor and
25 credibility. In Utica Observer-Dispatch, Inc. v. NLRB, 229 F.
26 2d 575, 577 (1956), the court pointed out:

1 "The Board is, of course, obliged to give
2 weight to the findings of the Trial Ex-
3 aminer, especially where they rest on
credibility and demeanor of the witnesses."

4 It would seem that the Hearing Examiner would, in the instant
5 case, be in a much better position to determine the degree
6 of culpability than would the Commission, from a reading of
7 the cold record. This is particularly true with regard to
8 the charge of misrepresentation, since the major evidentiary
9 support was in the form of testimony. Indeed, the great
10 disparity between the penalties imposed by the Hearing Ex-
11 aminer and the Commission indicate that the record failed
12 to accurately reflect the tenor of the testimony by which
13 the substance of the transactions involved was deduced.

14 The only other possible explanation for the Commis-
15 sion's apparently arbitrary action is that there is a com-
16 plete lack of standards as to the penalty which prohibited
17 conduct calls for. If there is such a lack of standards,
18 then the Commission's action, in increasing the penalty,
19 must be termed arbitrary and capricious. To deprive an
20 individual of his livelihood under such conditions is
21 grossly unfair, as recent United States Supreme Court
22 cases, as well as California cases, have pointed out in
23 holding that the right to engage in a profession is a right
24 of such significance as to require the utmost protection of
25 due process. Garrity v. New Jersey, supra; Spevack v. Klein,
26 supra; Elfbrandt v. Russell, supra, Konigsberg v. State Bar



1 of California, supra; Schware v. Board of Bar Examiners,
2 supra; Elder v. Board of Medical Examiners, supra; Shively
3 v. Stewart, supra, People v. One 1960 Cadillac Coupe, supra.

4 The wide range of penalties imposed by the Hearing
5 Examiner (from censure of Pambrun to a six month suspension
6 for Reigel, to complete bar for Nees, the Registrant and the
7 partners) indicates that the Hearing Examiner was convinced
8 from his direct exposure to the testimony and demeanor of
9 the witnesses that there was a wide disparity of culpability
10 among the alleged violators, and that individualized treat-
11 ment was indicated. The Commission, on the other hand, con-
12 cluded that a complete bar should be applied to all the
13 alleged violators. It appears that the Hearing Examiner
14 treated with a scalpel that which the Commission went after
15 with an axe.

16 The approach of the Commission would not be so dis-
17concerting if it had offered some explanation for its actions
18 or indicated some standards by which it reached its conclu-
19 sions. It should be noted, that the Commission had earlier
20 stipulated to an offer of settlement from another salesman,
21 John Desbrow, who was charged with the same violations as
22 Reigel (R. 1273); pursuant to this offer of settlement Desbrow
23 was merely suspended for 45 days. It is extremely difficult
24 to determine why Desbrow received such a light penalty,
25 while the other salesmen were barred in perpetuity from
26 engaging in their chosen profession, unless the fact that

1 Desbrow waived his constitutional right to a hearing was
2 relevant. However, it should be recalled that it is uncon-
3 stitutional to make more "costly" the exercise of a con-
4 stitutional right, so that failure to waive one's consti-
5 tutional right to a hearing should not result in more severe
6 penalties, Spevack, supra.

7
8 C. The witnesses for the division were improperly
9 educated by an Agent of the Division prior to their testi-
10 mony.

11 In reviewing the evidence presented by the Division,
12 it is of critical importance, to both the credibility of the
13 testimony and the fairness of the hearing, that investigator
14 Hiller admits that each witness for the Division, prior to
15 his testimony, had his memory "refreshed" from notes prepared
16 by Hiller and not the witnesses (R. 530, 531).

17 "Hearing Examiner Gross: Did you see
18 every investor witness who appeared here
before he took the stand?

19 The Witness [Hiller]: I believe so.

20 Hearing Examiner Gross: All right, Go ahead.

21 By Mr. Fleischman:

22 Q. You testified that documents were showed
23 to them. Can you tell me what those documents
were?

24 A. The documents were the memorandums of
interviews.

25 Q. Did these documents contain anything
26 on them aside from what you had put on
them at the time of the interviews? In other

1 words, were there any kind of pencil marks
2 or notations on these documents when they
3 were shown to the witnesses - underlinings
4 or any other kind of notations?

5 A. Yes.

6 Q. Did you have any conversations with the
7 witnesses concerning what appeared on the
8 face of these documents - any kind of con-
9 versation?

10 A. I had conversations with the witnesses,
11 that is right. (R.: 530, 531)."

12 It is submitted that in light of this highly irregular
13 conduct on the part of the Division's investigator, the
14 rights of Reigel, as well as the other salesmen, have been
15 substantially prejudiced. The prompting and refreshing
16 element of those pre-testimony conversations was more con-
17 ducive to consistency than truth, and, as such, was improper.
18 This conduct was particularly prejudicial due to the fact
19 that Reigel was not represented by counsel and could not
20 effectively cross-examine Mr. Hiller and the investor wit-
21 nesses in order to determine the extent, if any, to which
22 Mr. Hiller's notes influenced both the manner in which such
23 witnesses testified, and the content of their testimony.
24 Indicative of the lack of approbation with which such
25 "education techniques" are viewed, is the prohibition under
26 California law which, at the time of the Hearing, stated:

"A witness is allowed to refresh his memory
respecting a fact, by anything written by
himself, or under his direction, at the
time when the fact was fresh in his memory
and he knew that the same was correctly



1 stated in the writing."^{5/}(Emphasis added).
2 C.C.P. Section 247.

3 It is further submitted that this highly irregular "refresh-
4 ing" technique must, at the very least, cast significant
5 doubt on the credibility of those witnesses.

6
7 D. The record was further tainted by the admission
8 and reliance on incompetent hearsay evidence.

9 The findings of the Commission that Reigel had no
10 reasonable basis for representations made by him to buyers
11 concerning Jayark stock is based in large part upon a
12 letter which was clearly hearsay (R.2004). Although it has
13 often been held that technical rules of evidence do not
14 apply in an administrative hearing, it is also the rule
15 that relevant evidence should be admitted "if it is the
16 sort of evidence on which responsible persons are accustomed
17 to rely in the conduct of serious affairs." Cal. Govt. Code
18 11513 (c). Using this common sense approach there is a
19 very serious question as to whether the letter in question
20 should even have been admissible, let alone whether it
21 should have been the basis for a finding which resulted in
22 Reigel being permanently prohibited from engaging in his
23

24
25 ^{5/}This section was changed when California adopted
26 the Uniform Evidence Code.

1 chosen profession.

2 The Commission's determination that there was no
3 adequate basis for optimistic representations with regard
4 to the future of Jayark stock was largely based upon their
5 finding that there was never a "firm arrangement" with
6 Goldwyn for the releasing of films (R. 2004). The basis for
7 the latter finding was a letter from George Slaff, Goldwyn's
8 attorney (R. 2003). It appears obvious that the author of
9 this hearsay evidence (Slaff), as the attorney of the party
10 who had backed out of the contract, had every reason to
11 color his statements regarding the contract in such a way as
12 to negate the finality of the negotiations. For if the
13 negotiations had been finalized, the "backing out" done by
14 Goldwyn would have amounted to a breach of contract. That
15 this piece of hearsay evidence was exactly the kind of
16 evidence that the hearsay rule was meant to exclude --
17 evidence where the right to cross-examination is crucial
18 to a fair and unbiased explanation, seems obvious.

19 Since the only relevant evidence to support the
20 Commission's finding that "Respondents had no adequate basis
21 for their optimistic representations regarding the acquisi-
22 tion of film libraries," (R. 2003) is hearsay (the letter from
23 attorney George Slaff) there is insufficient evidence to
24 support the findings on review.

25 The Court stated in a post A.P.A. case, Willapoint
26 Oysters, Inc. v. Ewing, 174 F 2d 676, 691 (9th Cir.1949):

1 ". . .the findings, to be valid, cannot be
2 based upon hearsay alone, nor upon hearsay
 corroborated by a mere scintilla."

3 The Commission attempted to add additional support to
4 the above finding by stating that Kaufman wrote a letter
5 to Appellant referring to the negotiations but did not men-
6 tion that he had a "firm arrangement". Such "non-evidence"
7 gives no support to the finding. The letter itself would
8 have been hearsay, and to draw an inference from the failure
9 to state something in the letter, is clearly so tenuous
10 and bootstrap as to be completely irrelevant. Certainly, by
11 its very definition, irrelevant information is not sufficient
12 to support a finding. For the same reasons, the fact that no
13 public announcement was made is irrelevant (R. 2004). There
14 is not even a mere "scintilla" of relevant evidence, other
15 than the highly suspect letter from Goldwyn's attorney,
16 to support the Commission's finding.

17
18 E. Reigel was without counsel during substantive
19 portions of the proceedings, which proceedings, though
20 designated "administrative" in nature had the effect of
21 imposing quasi-criminal sanctions denying petitioner the
22 right to engage in his profession.

23 In the instant case Reigel has been permanently barred
24 from his chosen profession, and accused of acts which could
25 be the basis of criminal charges on a hearing record bearing
26 the taint of numerous procedural irregularities which singly,



1 and most certainly cumulatively, interfered seriously with
2 a proper determination of the facts. Although opposing
3 counsel may argue that a particular irregularity is not sig-
4 nificant enough to compel a new hearing, any objective view
5 of the proceedings would show that the numerous irregulari-
6 ties, each of which casts doubt upon the fairness of the
7 outcome, adds up to a cumulative lack of the "fundamental
8 fairness" which is necessary to substantive due process.

9
10 It should be kept in mind that the effect of the
11 numerous irregularities was multiplied by the fact that
12 petitioner was not represented by counsel at the most
13 critical point in these proceedings -- the initial hearing
14 before the Examiner. It is the record which is the product
15 of that hearing upon which the Commission based its
16 findings.

17 The United States Supreme Court has pointed out that
18 when counsel is not available during a critical stage in the
19 proceedings, the effectiveness of counsel at later stages can
20 be greatly reduced, and the truth-seeking function seriously
21 interfered with. Miranda v. Arizona, 384 U.S.436 (1966)
22 Although it is not contended here that Petitioner was deprived
23 of a right to counsel, it is contended that the lack of
24 counsel magnified the impact of the other procedural infirmi-
25 ties, and interfered with the compilation of a record which
26



1 adequately reflected the facts of the transactions in the
2 instant case.

3 Since Reigel was without counsel the Hearing Examiner
4 should have had the affirmative duty to use even greater
5 care concerning the admission of irrelevant evidence, and
6 to avoid using technical language without explaining to
7 Reigel, in lay language, the meaning of the terms. 6/
8 The importance of being represented by counsel is particular-
9 ly acute in a hearing such as that held in the instant case
10 where Reigel was charged with violation of a highly technical
11 statute, and was confronted with a protagonist (the Division's
12 attorney) highly familiar with the lexicon of SEC terminology.
13 Therefore, a new hearing at which Reigel will be represented
14 by counsel is the only way that a proper determination of
15 the facts can be made.

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21 6/ For example: The Hearing Examiner admitted
22 evidence he later found to be irrelevant and unfair and
23 "reserved ruling" on the objections without explaining to
24 Reigel the significance of these terms (R. 469, line 20,
25 et seq, R. 1696).

1 II

2 THERE IS NO EVIDENCE IN THE RECORD TO SHOW
3 THAT APPELLANT HAS VIOLATED SECTION V OF
4 THE SECURITIES AND EXCHANGE ACT OF 1933 BY
5 WILLFULLY SELLING UNREGISTERED SECURITIES.

6 A. Reigel did not sell unregistered securities.

7 The Commission admits in its Findings (R. 2008) that
8 Reigel did not sell the unregistered shares of Jayark.
9 Neither the SEC in its Findings, the Hearing Examiner in his
10 Initial Decision, nor the Division of Trading and Markets, in
11 its Briefs, have cited any case in which a salesman has been
12 found to have violated Section V of the Securities and Ex-
13 change Act of 1933, when he has not, in fact, sold or
14 delivered unregistered securities. The mere fact that
15 Reigel may have assisted in acquiring the shares for his
16 employer, does not implicate him in the subsequent action of
17 his employer in dealing with the shares. Certainly, Reigel
18 had a right to assume that his employer would comply with
19 the law in selling those securities. It has not been shown
20 that Reigel had a duty to inquire into the correctness of
21 his employer's belief that the shares were exempt from
22 registration. This is particularly true since Reigel did not,
23 himself, sell any of the unregistered shares, and where, as
24 here, he did not own an interest in the unregistered shares
25 sold by others to the public.

26 Since the Commission was confronted with the fact that
Reigel did not sell unregistered shares to the public, it

1 asserted that he "participated" (R. 2008) in the sale of
2 unregistered shares. The use of the word "participated" in
3 the Commission's decision is comparable to the "activist"
4 theory utilized by the Division of Trading and Markets in its
5 Initial Brief dated October 2, 1965 (R. 1305). Both terms
6 represent efforts to overcome two insurmountable problems of
7 proof confronting the Commission: (1) Reigel did not sell
8 unregistered shares. (2) Reigel was not a principal of
9 Century Securities which did sell unregistered shares. In a
10 futile effort to establish that Reigel was something more than
11 a salesman of Century Securities, the Division of Trading
12 and Markets attempted to prove that he was Sales Manager
13 (R. 1305). This assertion was controverted by the unequivocal
14 testimony of Fred Colton (R. 458) and rightly not adopted by
15 either the Hearing Examiner in his Initial Decision or the
16 Commission's Findings.

17
18 B. Reigel's conduct with respect to the unregistered
19 securities sold by others was not "willful".

20 Since Reigel didn't sell any unregistered securities
21 whatsoever, he obviously could not have willfully sold un-
22 registered securities.

23 Nevertheless, Reigel vigorously disputes the seemingly
24 irrelevant contention that he had sufficient knowledge of
25 the status of Jayark shares to have been able to have acted
26 willfully with respect to them. No evidence was presented

1 to show that Appellant knew that the stock was not exempt
2 from registration. 7/ Therefore, it would have to be shown
3 that appellant should have known of the status of the shares
4 in order to conclude that he could have acted willfully.

5 The Commission states in its Findings (R.2007) that:

6 "The asserted reliance by Registrant and its
7 partners upon a written statement by Kaufman
8 that Jayark's counsel had advised that the
9 shares were exempt from registration under
existing regulations could not be justified,
and they should have made inquiry to deter-
mine the basis for any such exemption."

10 It should be noted that the Commission says the partners
11 should have made inquiry. Nowhere do they state that Reigel
12 should have undertaken such inquiry. To place such a responsi-
13 bility upon a salesman who acted in good faith would seem
14 unwarranted. Indeed, the cases cited by the Hearing Examiner
15 and the Commission do not place such a responsibility upon
16 employees, but merely hold that the proprietors of brokerage
17 firms should have a responsibility to make reasonable in-
18 quiry into the registration status of the shares they deal
19 with. 8/ (R. 1675, R 2007).

20 7/ Evidence was introduced which showed that appellant
21 had been informed in a letter from Kaufman that Kaufman's
22 attorney had advised that the shares would be exempt from
SEC registration. (See Division's Exhibit No. 3, letter dated
September 9, 1963.)

23 8/ SEC v. Culpepper, 270 F 2d 241 (C.A.2 1959); Assur-
24 ance Investment Co., Securities Exchange Act Release 7862,
25 (April 15, 1966) p. 2; Securities Act Release No.4445 (Feb.2,
26 1962), Morris J. Reiter, Securities Exchange Act Release No.
6849, (July 13, 1962); Gilligan, Will & Co., 38 SEC 388, 395
(1958), aff'd 267 F. 2d 461 (C.A. 2, 1959), cert. denied
361 U.S. 896.

1 No cases were cited for the specific holding that
2 Reigel acted willfully with respect to the unregistered Jayark
3 shares (R. 2007, 2008). However, in concluding that the
4 partners, Colton and Fleischman, acted willfully with
5 respect to unregistered securities, the Hearing Examiner
6 cited several cases. Although these cases may give some
7 support to the proposition that the partners acted willfully
8 with respect to the securities, the cases cannot be used
9 inferentially to support a finding of willfulness on the
10 part of Reigel. Thompson Ross Securities Co. (R.1673 n.8)
11 6 SEC 1111, 1112, is comparable to Culpepper, supra, as it
12 deals with the responsibility of the proprietor of a firm
13 to inquire as to whether shares are exempt from registration.
14 Hughes vs. SEC, 147 F. 2d 969, 977 (CADC, 1949) and Schuck
15 vs. SEC, 264 F. 2d 358, 363, 2.18 (CADC 1958) (R. 1673, n.8)
16 define willfulness as requiring that the "person charged with
17 the duty know what he is doing. It does not mean that he
18 . . . must suppose that he is breaking the law." In Hughes
19 the proprietor of a firm, after receiving repeated notifica-
20 tions from the SEC that she was not making sufficient dis-
21 closure to her clients, defended an action based on that
22 violation, with the argument that her interpretation of the
23 law indicated that she was making sufficient disclosure.
24 In Schuck, the proprietor had failed to maintain a sufficient
25 net capital as required, and his defense, that the failure
26 was inadvertent, was rejected. In both cases the individuals

1 should have been "charged with the duty" since they were the
2 proprietors, and therefore had the ultimate responsibility
3 to see that their businesses were run in accordance with the
4 law. No cases were cited which would "charge" appellant
5 Reigel "with the duty" of inquiring into the validity of
6 the claimed exemption from registration for Jayark stock.

7 The last two cases cited by the Commission in support
8 of their finding that the partners acted willfully, were
9 Henry P. Rosenfeld, 32 SEC 731, 739, 740 (1951) and Underhill
10 SEC Release No. 7668 (Aug. 3, 1965) (R. 1673, n.8). These
11 cases likewise do not support a finding of willfulness with
12 respect to the sale of unregistered securities on the part
13 of Reigel. In Underhill, a salesman was found to have made
14 flagrant misrepresentations to induce the sale of stock
15 with "conscious and knowing intent" (Id. at 7) while in
16 Rosenfeld, similar misrepresentations were made and found
17 to be "either deliberate or grossly reckless" (Id. at 739).
18 Naturally, such misrepresentations will support a finding of
19 willfulness and it is not necessary to find that there was
20 an "intention to violate the law" (Underhill at 7), for when
21 an individual sells stock to the public certainly he "has a
22 duty" to refrain from making deliberate, intentional or
23 grossly reckless misrepresentations. 9/

24 9/ It should be noted that these cases were not cited
25 with regard to alleged misrepresentations by any of the
26 Respondents with respect to the sale of the registered shares
of Jayark, and no allegations were made as to misrepresentations
by Reigel with respect to the unregistered shares of Jayark
(as will be illustrated infra such representations as were
made by Reigel with respect to the registered shares of Jayark
were reasonable and proper).



1 But Reigel made no sales of unregistered stock and made no
2 representations as to the registered or unregistered status of
3 the stock and no such representations can be implied because
4 the only Jayark shares sold by Reigel were properly registered.
5 These cases are therefore not authority for the proposition
6 that an individual, as Reigel in the instant case, has "a
7 duty" to inquire into his employer's belief that the shares
8 were exempt from registration.

9 In the absence of authority for the proposition that
10 Reigel should have known of the status of the stock, in order
11 to make a finding of willfulness, the Commission must show that
12 he had actual knowledge. No evidence of actual knowledge was
13 considered and, on the contrary, evidence was presented which
14 indicated Reigel reasonably believed that the transaction in
15 Jayark was proper. The Hearing Examiner in his Initial Deci-
16 sion (R.1698) stated: "Since registrant was an underwriter of
17 Jayark stock earlier in the same year, at which time there was
18 no question as to the propriety of the issue, only substantial
19 evidence would warrant a finding of such knowledge." The above
20 statement which evidently refers to salesmen, other than Reigel,
21 who actually sold unregistered Jayark stock, would indicate
22 that Reigel also had reasonable grounds for believing there
23 was no irregularity in the transaction in question. Therefore,
24 it does not appear to have been unreasonable of Reigel to trust
25 to Kaufman's assurances, based on a legal opinion that the
26 stock was exempt.

Thus, on a fair reading of the record it is evident



1 that the allegation that Reigel bears responsibility for
2 the sale of the unregistered stock fails in every respect.
3 The Commission conceded that Reigel did not sell or deliver
4 unregistered Jayark stock (p. 2008). If he did not sell or
5 deliver such stock, he cannot be held liable as a seller
6 for anyone else's sale of such unregistered stock. This would
7 be true even if he had actual knowledge of the status of the
8 stock. That liability does not attach is even more clearly
9 demonstrated by reason of the Division's failure to prove
10 that he had or should have had any such knowledge.

1 III

2 THERE IS INSUFFICIENT EVIDENCE IN THE RECORD
3 TO SHOW THAT PETITIONER VIOLATED THE ANTI-
4 FRAUD PROVISIONS OF THE SECURITIES ACT BY
5 FAILING TO INFORM CUSTOMERS OF THE FINANCIAL
6 CONDITION OF JAYARK.

7 Only two witnesses called by the Division purchased
8 Jayark shares from Reigel; Dorothy Breslin, hereinafter re-
9 ferred to as Mrs. B, and Anne Breslin deBiexedon, herein-
10 after referred to as Mrs. deB. Whether or not Reigel was
11 guilty of fraudulent misconduct towards these customers
12 depends on the nature of the representations made, the nature
13 and significance of any omissions, and Reigel's basis for
14 believing the representations that he did make were true.

15 In the case of Trussell vs. United Underwriters, Ltd.,
16 228 F. Supp. 757 (U.S.C.D. Dist. Colo. 1964), at page 762,
17 the court states:

18 "[N]either Section 17(a)(2) nor Rule 10B-5(2)
19 requires a seller to 'state every fact about
20 stock offered that a prospective purchaser
21 might like to know or that might, if known,
22 tend to influence his decision'" Quoting from
23 Otis and Company v. SEC. 106, F. 2d 579, 582
24 (1939 6th Cir.)

25 If a salesman is not obligated to reveal every rele-
26 vant fact to a prospective purchaser as indicated above, it
follows that he is not obligated to inform that customer
about those facts which are clearly not relevant to the
purchaser's intent. Thus, the Division must show not only
that Reigel failed to inform his customers about the finan-
cial position of Jayark, but also that such information was

1 material to the purchaser under all of the circumstances,
2 and would have affected the customer's intent to purchase
3 had he or she known of the financial facts not presented.

4 In this case, it is quite apparent that the purchasers
5 were not looking to the present financial condition of Jayark
6 to justify their purchase. Neither woman even considered the
7 possibility of cancelling her purchase or rescinding her
8 agreement, though she received the information immediately
9 after her purchase (R. 148, 163, 164), and though she had
10 ample time to do so, because the financial position of Jayark
11 was not material to her contemplated bargain. Mrs. deB
12 admits frankly (R. 163) that she did not even take the time
13 to read the information sent, for she was interested in the
14 speculative value of the stock, not its dividend-producing
15 ability (R. 156). Mrs. B also concedes that she was sent
16 the full information relating to Jayark's financial condi-
17 tion (R. 148).

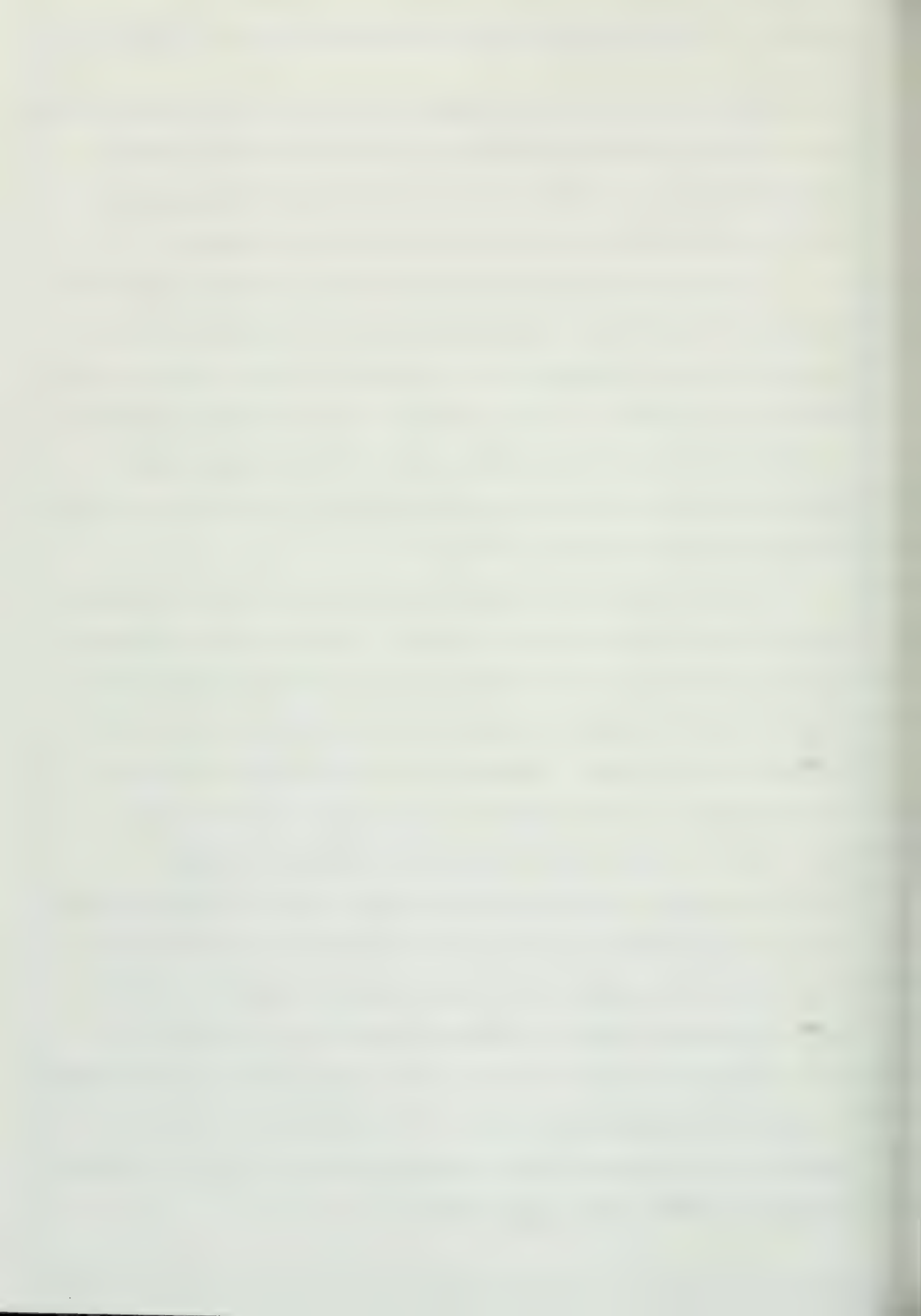
18 It is important in this regard to recognize that both
19 women were looking for speculative stock (R. 152, 163) not
20 dividend paying investments. In spite of the lengthy discourse
21 in the Division Brief about knowledge of the financial position
22 of Jayark itself, it did not produce any evidence that such
23 knowledge was relevant to the buyer's bargain. Nor did it show
24 that the financial deficits of Jayark lessened the value of the
25 stock in the minds of these speculating investors. On the
26 contrary, knowledge of Jayark's deficits might have provided



1 increased incentive to purchase the stock, for it is well known
2 that where a significant upturn in profit is anticipated,
3 a previous loss, which may be carried over subsequently,
4 is a considerable tax advantage to the speculator.

5 If either buyer thought that the previous operating
6 losses of Jayark were important negative considerations,
7 they could have attempted to rescind or cancel, yet they did
8 neither, in point of fact, neither Mrs. B nor Mrs. deB had
9 sold their stock even at the time of the hearing, thus
10 demonstrating that it was the speculation interest in Jayark
11 that motivated them (R. 143,160).

12 The underlying assumption of the Division's charge
13 that Reigel had willfully failed to disclose the financial
14 position of Jayark was that by such deliberate omissions
15 he was able to induce an otherwise unwilling buyer to pur-
16 chase Jayark stock. However, both witnesses were eager
17 to purchase for they wanted a quick gain in the market
18 (R. 151, 157) the fast dollar. In response to their in-
19 quiries Reigel told them about Jayark. Mrs. B testified that
20 Reigel explained to her the possibilities of Jayark's ac-
21 quisition of valuable film distribution rights (R. 152).
22 The independent decision to purchase that stock made by
23 both women was the result of their own judgment. These women
24 were neither senile nor naive. Both were fully capable of
25 making reasoned decisions; both were aware of the realities
26 of a speculative stock purchase.



IV

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT
THE CONCLUSION THAT THERE WAS NO REASONABLE
BASIS FOR THE PREDICTIONS MADE BY APPELLANT.

In order to evaluate the reasonableness of Reigel's projections with regard to the price of Jayark stock, it is necessary to examine closely the testimony of the witnesses to discover the content of those projections. The following analysis of the hearing transcript will show that the actual extent and nature of the alleged projections is in considerable controversy.

Mrs. B testified that Reigel told her that the stock would go "sky high" at least "triple" (R. 140), and she later testified that she was "promised the moon with a fence around it." (R 147), and that Jayark stock "was going to the moon".(R. 151). Subsequently, however, she admitted that those phrases were probably not Reigel's but were her own interpretations of what he said (R. 151). Later in her testimony she agreed that it was fair to describe what Reigel had told her in the following words: "The stock would sell at higher prices if the libraries were negotiated." (R.152) (Emphasis added.)

Reigel does not deny that he was very optimistic about the future of Jayark. Indeed, the evidence shows that at the time in question he had every right to be. It is apparent, however, that this optimism was translated into far more glowing terms in the imagination of Mrs. B whose per-

1 sonal involvement and disappointment in a speculative
2 venture clearly colored her testimony. Mrs. deB stated that
3 she was looking for a speculative stock that would double
4 her money in a short period of time. (R. 157). She testified
5 that she told Reigel of her desire and that as a result he
6 recommended that she buy Jayark stock. This recommendation
7 by Reigel has been interpreted by counsel for the Division
8 as being equivalent to a positive affirmative representation
9 that Jayark stock would, in fact, double within that short
10 period of time. It is submitted that this analysis is in-
11 correct, and finds no foundation in the facts of this case.

12 Reigel's obligation as a salesman was to make a bona
13 fide and honest attempt to meet the needs and desires of
14 his customers. When Mrs. deB requested a fast growing
15 speculative stock it was Reigel's duty to recommend to her
16 what he believed to be a good speculation. A good speculation
17 differs considerably from a blue chip investment. By defini-
18 tion, speculation involves a chance, the chance that the price
19 of the stock will increase upon the happening of some event.
20 It is rudimentary that if that event does not occur, then
21 the price of the stock will not rise and the speculative,
22 anticipated profits will not be realized. The Commission
23 seems to suggest that the salesman may be held for fraud
24 whenever he sells a speculative stock that fails to achieve
25 its potential. The result of this suggestion is to make the
26 salesman the personal guarantor of the speculations that he



1 sells. Such a result is neither desirable nor reasonable.

2 There is not a shred of evidence that Reigel made his
3 predictions in bad faith. Furthermore, the Division failed
4 to prove that the projections made by Reigel on the future
5 price of Jayark were unreasonable, primarily because there
6 was overwhelming evidence to the effect that such projections
7 were, in fact, reasonable. These projections were based upon
8 the possibility of Jayark Films acquiring the distribution
9 rights to a significant film library. It has not been dis-
10 puted that such an acquisition would have considerably in-
11 creased the price and value of Jayark's stock. Rather, the
12 Commission concluded that there was no adequate basis for
13 the optimistic representations regarding the acquisition of
14 film libraries. (R. 2003) The Commission's position in
15 this respect is untenable. The unchallenged and uncontradicted
16 testimony of Duke Goldstone, a primary party to the negotia-
17 tions for the acquisitions of the distribution rights of the
18 above mentioned film library, firmly establishes that such
19 an acquisition was very probable indeed (R. 497, 498, 499, 500).
20 In fact, a deal for the distribution of a \$12,000,000.00 film
21 library owned by Samuel Goldwyn, was consummated (R. 498, 499).

22 "[Goldstone] A: I was present at all of the
23 meetings as these negotiations developed,
24 until the final meeting when Mr. Goldwyn said
'all right we have a deal' and shook hands."
(R 498).

25 At that time the negotiations were completed and Jayark to all
26 intents and purposes had made a deal with Goldwyn to distri-



1 bute the Goldwyn films on television (R. 498).^{10/}

2 "Q You said you shook hands and had a deal;
3 is that right?

4 A That is right. (R 499)."

5 In addition, Goldstone testified that the ability of
6 Jayark to finance the project was assured by the backing of
7 the Walter Heller Company and that a letter to that effect
8 was mailed to Mr. Goldwyn (R. 500, 501). Thus, there can be
9 no question that the statements about the future of Jayark
10 were founded upon substantial fact. Projections made on
11 the basis of such fact are in no sense reckless.

12 Only the unanticipated breach of contract by Goldwyn
13 prevented the film acquisition that would have significantly
14 affected the price of Jayark stock. The Division cannot
15 negate the honest and reasonable nature of the statements
16 made simply because, in the final analysis, Jayark was not
17 able to acquire those valued film rights. The Division is
18 operating from a position of hindsight not available to
19 the parties at the time of the questioned transaction.

20 Goldstone further testified that Jayark was prepared
21 to sue Goldwyn for the breach of contract, but decided not

22 10/ The technical enforceability of the contract
23 with Goldwyn was not really in issue in the hearing. There-
24 fore, in citing the possible application of the California
25 Statute of Frauds (R.2004 n. 4 Commission's Findings) is to
26 say the least inappropriate. Any number of exceptions to
the Statute of Frauds (e.g. detrimental reliance), might
have estopped Goldwyn from asserting the Statute. Goble v.
Dotson, 203 C.A. 2d 272, 21 Cal.Rptr.769 (1962). Of course
there can be a valid contract which is nevertheless unenforce-
able due to the Statute of Frauds. O'Brien v. O'Brien, 197
C. 577, 24 P. 861 (1925).



1 to only because, "... when Paramount became serious and inter-
2 ested we decided it would be a bad thing, businesswise, to
3 go ahead with the suit against Goldwyn at a time when it
4 looked like we had a deal with Paramount." (R. 505).

5 Thus, it is clear that the Paramount negotiations had
6 also advanced to a serious stage, coming quite close to con-
7 summation. Walter Heller was working with Jayark to provide
8 a substantial financial basis for any deal that could be
9 reached. (R. 505, 506). Negotiations between principals of
10 the stature of Walter E. Heller, Samuel Goldwyn and Paramount
11 are the substance, the essence of what makes for a specula-
12 tive security.

13 The Division neither confronted nor disputed this
14 evidence of Mr. Goldstone, evidence which established clearly
15 that Jayark at first was, in fact, on the brink of a deal
16 that would have increased the value of its stock greatly,
17 and that was apparently later consummated (R. 499,506).

18 The sales made to Mrs. B and Mrs. deB were made
19 during the period of the Goldwyn negotiations. 11/ There
20 is evidence in the record that Reigel was aware of the
21 status of these negotiations at the time of his making any
22 representations to the purchasers in that he had been in-
23 formed both by his employer and by correspondence from
24 Kaufman (R. 427, 445 and Respondent's Exhibit E.)

25 11/ The purchases were confirmed on June 12, 1963, and
26 June 6, 1963 (R.140,157). The Slaff letter indicated that the
negotiations were going on from early May to late June.
(R.2003).



1 The Division failed to prove the testimony of Gold-
2 stone was false. It failed to prove the acquisition of the
3 distribution rights to a valuable film library was not in the
4 offering. It failed to prove that Reigel's predictions were not
5 based on reliable information. It failed to prove that the
6 price of Jayark stock would not have gone up as predicted. It
7 is submitted that in view of the fact that witnesses needed
8 to make such proof were available locally, the Division's
9 failure to call such witness is a clear admission of the
10 validity of Goldstone's testimony. The importance of this
11 testimony cannot be overemphasized.

12 The Commission in its Findings (R.2003), and the Hear-
13 ing Examiner in his Initial Decision (R.1693), both asserted
14 that "predictions of specific and substantial increases in the
15 price of a speculative security in a relatively short period
16 of time are inherently fraudulent and cannot be justified."Al-
17 though these quotations lead one to believe that even if there
18 is a substantial and reasonable basis to support a prediction,
19 such a prediction is improper, an examination of the cases cited
20 by both the Commission and the Hearing Examiner indicate that
21 in every case where this language has been used there has been
22 overwhelming and independent evidence to support the unreason-
23 ableness of the prediction, furthermore, independent findings
24 that the predictions had no reasonable basis were in each case
25 made. Therefore, the language in the cases cited is mere dicta.
26 There has been no square holding on this point. Indeed,



1 even this dicta evidently has never been repeated in a
2 federal court as the only citations by the Hearing Examiner
3 and the Commission, where this language can be found, are
4 to orders or releases of the Commission. The one federal
5 court case cited by the Hearing Examiner (R. 1693 n. 41)
6 for this proposition, SEC v. Johns, 207 F. Supp. 566,
7 U.S. D.C. D. New Jersey 1962) does not even repeat this
8 dicta. It is very difficult to understand why the Hearing
9 Examiner cited Johns for this proposition, particularly
10 since it actually gives aid to Appellant's case. The court
11 stated in Johns at page 573 that it was not a defense "that
12 representations made to induce sale of stock dealt merely
13 with forecasts of future events related to the projected
14 earnings and the value of securities, except to the extent
15 that there is a rational basis from existing facts upon
16 which forecast can be made, and a fair disclosure of the
17 material facts." [Emphasis added]. Johns therefore makes it
18 clear that a rational basis for predictions is to be taken
19 into consideration in determining whether representations
20 were fraudulently made, and that "predictions of specific
21 and substantial increases in the price of a speculative
22 security in a relatively short period of time (R. 1693) is
23 not inherently fraudulent and may be proper when "there is
24 a rational basis from existing facts upon which forecast can
25 be made, and a fair disclosure of the material facts."
26 Johns, supra at 573.



1 It should be further noted that the cases cited by
2 the Hearing Examiner and by the Commission (R.1693,2003) are
3 not analogous to the case at bar since they did not deal
4 with predictions of increases in price which were expressly
5 made conditional on the happening of a future event.



1 CONCLUSION

2
3 Due to the procedural irregularities which substan-
4 tially impaired the efficacy and fairness of the fact finding
5 process at the hearing, and cast doubt on its constitutional
6 sufficiency, and due to the lack of sufficient evidence in
7 the record in support of the alleged violations, Appellant
8 Reigel respectfully requests that with respect to him:

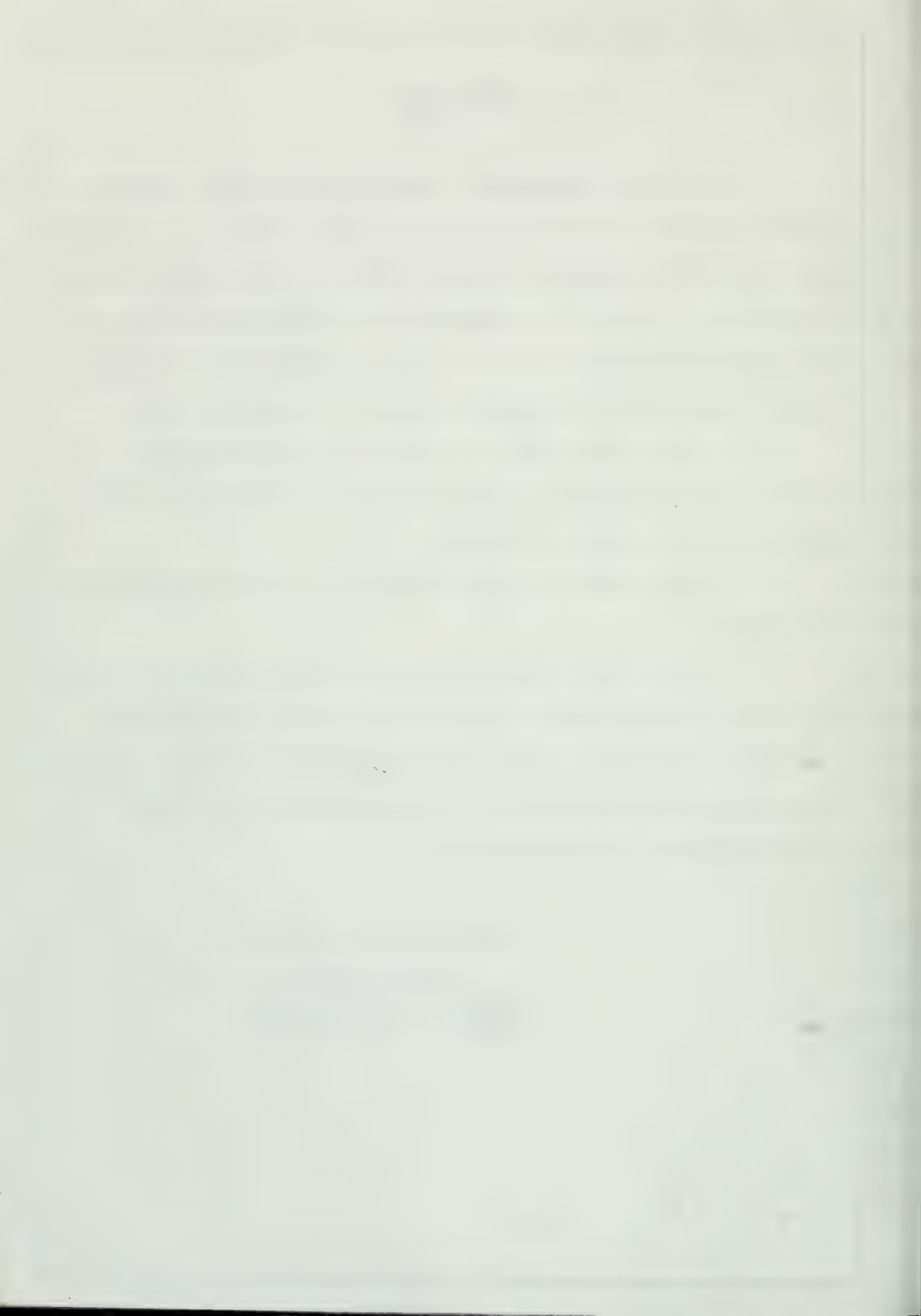
9 1) That the Court set aside the aforementioned
10 decision of the Hearing Examiner and the Findings of Fact
11 made by him in support thereof;

12 2) That the Findings and Order of the Commission be
13 set aside;

14 3) That the Commission be ordered to convene a new
15 hearing for the purpose of taking evidence, including the
16 testimony of Reigel, free of the irregularities that tainted
17 the previous hearing, and with the presence of counsel for
18 this Appellant, William Reigel.

19
20 Respectfully submitted,

21 BERNARD I. SEGAL
22 Bernard I. Segal,
23 Attorney for Appellant
24
25
26



1 UNITED STATES COURT OF APPEALS
2 FOR THE NINTH CIRCUIT
3

4 WILLIAM REIGEL,

5 Appellant,

6 -vs-

No. 22459

7 SECURITIES AND EXCHANGE
8 COMMISSION,

9 Respondent.
10

11 AFFIDAVIT OF SERVICE

12 STATE OF CALIFORNIA)
13 COUNTY OF LOS ANGELES) ss.

14 ELSIE R. STIVERS, being first duly sworn, deposes
15 and says that she is a secretary in the office of Bernard
16 I. Segal, attorney at law; that on December 12, 1968,
17 she served the attached Appellant's Opening Brief on the
18 persons named below, by placing a copy thereof in an envelope
19 properly addressed to them at their address appearing under
20 their names, which addresses are the last addresses of
21 said persons known to her, and the envelope containing
22 sufficient government postage was deposited by her in the
23 United States mail at 5670 Wilshire Boulevard, Los Angeles,
24 California 90036, for delivery by the United States Post
25 Office Department as directed by said envelope.
26



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 21 1969

No. 22459

WILLIAM REIGEL,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

FILED

FEB 17 1969

WM. B. LUCK

On Petition For Review of an Order of
the Securities and Exchange Commission

ANSWERING BRIEF OF RESPONDENT SECURITIES AND EXCHANGE COMMISSION

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TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| TABLE OF AUTHORITIES..... | 1 |
| COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW..... | 1 |
| COUNTERSTATEMENT OF THE CASE..... | 2 |
| STATUTES AND RULES INVOLVED..... | 10 |
| ARGUMENT..... | 10 |
| I. THE COMMISSION'S FINDINGS THAT REIGEL ENGAGED IN WILLFUL VIOLATIONS OF THE FEDERAL SECURITIES LAWS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE..... | 10 |
| A. <u>Reigel Willfully Violated Antifraud Provisions in the Sale of Registered Jayark Stock</u> | 11 |
| B. <u>Reigel Willfully Participated in the Public Distribution of Unregistered Jayark Stock</u> | 16 |
| II. REIGEL WAS ACCORDED A FAIR HEARING..... | 21 |
| A. <u>The Commission Did Not Draw an Ad- verse Inference from Reigel's Failure to Testify</u> | 21 |
| B. <u>The Commission Did Not Rely upon Hearsay Evidence</u> | 25 |
| C. <u>There Was Nothing Improper or Prejudi- cial in Refreshing the Recollection of Investor-Witnesses by Showing Them Memoranda of Prior Interviews</u> | 26 |
| D. <u>Reigel's Election to Forego Counsel at the Initial Hearing Provides No Basis for Attack on the Commission's Decision</u> | 28 |
| III. THE REMEDIAL ACTION TAKEN AGAINST REIGEL WAS WELL WITHIN THE COMMISSION'S DISCRETION... | 29 |
| CONCLUSION..... | 34 |
| STATUTORY APPENDIX..... | 1a |

TABLE OF AUTHORITIES

| | <u>Pages</u> |
|---|--------------|
| <u>Cases:</u> | |
| <u>Aircraft Dynamics Int'l Corp.</u> , 41 S.E.C. 566 (1963).... | 16 |
| <u>American Power & Light Co. v. Securities and Exchange Commission</u> , 329 U.S. 90 (1946)..... | 30 |
| <u>Archer v. Securities and Exchange Commission</u> , 133 F. 2d 795 (C.A. 8), <u>certiorari denied</u> , 319 U.S. 767 (1943)..... | 11 |
| <u>Associated Sec. Corp. v. Securities and Exchange Commission</u> , 283 F. 2d 773 (C.A. 10, 1960)..... | 32 |
| <u>Barnett v. United States</u> , 319 F. 2d 340 (C.A. 8, 1963). | 18,19 |
| <u>R. Baruch & Co.</u> , Securities Exchange Act Release No. 7932 (Aug. 9, 1966)..... | 16 |
| <u>Batten & Co. v. Securities and Exchange Commission</u> 345 F. 2d 82 (C.A. D.C., (1964)..... | 18 |
| <u>Berko v. Securities and Exchange Commission</u> , 316 F. 2d 137 (C.A. 2, 1963)..... | 13,16,32 |
| <u>Blaise, D'Antoni & Associates v. Securities and Exchange Commission</u> , 289 F. 2d 276 (C.A. 5), <u>rehearing denied per curiam</u> , 290 F. 2d 688 (C.A. 5, 1961)..... | 32 |
| <u>Bobbroff v. United States</u> , 202 F. 2d 389 (C.A. 9, 1953)..... | 13 |
| <u>Boruski v. Securities and Exchange Commission</u> , 340 F. 2d 991 (C.A. 2), <u>certiorari denied</u> , 381 U.S. 943 (1965)..... | 28 |
| <u>Brennan v. Midwestern United Life Ins. Co.</u> , 259 F. Supp. 673 (N.D. Ind., 1966), <u>adhered to</u> , 286 F. Supp. 702 (N.D. Ind., 1968)..... | 18 |
| <u>Burley & Co.</u> , 23 S.E.C. 461 (1946)..... | 18 |
| <u>Concrete Materials Corp. v. Federal Trade Commission</u> , 189 F. 2d 359 (C.A. 7, 1951)..... | 28 |

Cases (continued):

| | |
|--|-------|
| <u>Consolidated Edison Co. v. National Labor Relations Board</u> , 305 U.S. 197 (1938)..... | 26 |
| <u>Consolo v. Federal Maritime Commission</u> , 383 U.S. 607 (1966)..... | 11 |
| <u>M. G. Davis & Co. v. Cohen</u> , 256 F. Supp. 128 (S.D. N.Y.), <u>affirmed on other grounds</u> , 369 F. 2d 360 (C.A. 2, 1966)..... | 18 |
| <u>Dlugash v. Securities and Exchange Commission</u> , 373 F. 2d 107 (C.A. 2, 1967)..... | 19,33 |
| <u>Dowling Bros. Distilling Co. v. United States</u> , 153 F. 2d 353 (C.A. 6, 1946)..... | 27 |
| <u>Fanelli v. United States Gypsum Co.</u> , 141 F. 2d 216 (C.A. 2, 1944)..... | 27 |
| <u>Farrell v. United States</u> , 321 F. 2d 409 (C.A. 9, 1963), <u>certiorari denied</u> , 375 U.S. 992 (1964)..... | 13 |
| <u>Federal Trade Commission v. Cement Institute</u> , 333 U.S. 683 (1948)..... | 26 |
| <u>Gearhart & Otis, Inc. v. Securities and Exchange Commission</u> , 348 F. 2d 798 (C.A. D.C., 1965)..... | 19 |
| <u>Gilligan, Will & Co. v. Securities and Exchange Commission</u> , 267 F. 2d 461 (C.A. 2), <u>certiorari denied</u> , 361 U.S. 896 (1959)..... | 19 |
| <u>Hartford Gas Co. v. Securities and Exchange Commission</u> , 129 F. 2d 794 (C.A. 2, 1942)..... | 11 |
| <u>R. A. Holman & Co. v. Securities and Exchange Commission</u> , 366 F. 446 (C.A. 2, 1966), <u>amended per curiam in other respects</u> , 377 F. 2d 665 (C.A. 2), <u>certiorari denied</u> , 389 U.S. 991 (1967)..... | 16 |
| <u>Hughes v. Securities and Exchange Commission</u> , 174 F. 2d 969 (C.A. D.C., 1940)..... | 13 |
| <u>Keele Hair & Scalp Specialists, Inc. v. Federal Trade Commission</u> , 275 F. 2d 18 (C.A. 5, 1960)..... | 11 |
| <u>Luckhurst & Co.</u> , 40 S.E.C. 539 (1961)..... | 18 |

Cases (continued):

| | <u>Pages</u> |
|---|--------------|
| <u>Mason, Moran & Co., 35 S.E.C. 85 (1953).....</u> | 18 |
| <u>National Labor Relations Board v. Marcus Trucking Co., 286 F. 2d 583 (C.A. 2, 1961).....</u> | 11 |
| <u>North Whittier Heights Citrus Ass'n v. National Labor Relations Board, 109 F. 2d 76 (C.A. 9) certiorari denied, 310 U.S. 632 (1946).....</u> | 11 |
| <u>N. Sims Organ & Co. v. Securities and Exchange Commission, 293 F. 2d 78 (C.A. 2, 1961), certiorari denied, 368 U.S. 968 (1962).....</u> | 23 |
| <u>Pettit v. American Stock Exchange, 217 F. Supp. 21 (S.D. N.Y., 1963).....</u> | 18 |
| <u>Pierce v. Securities and Exchange Commission, 239 F. 2d 160 (C.A. 9, 1956).....</u> | 10,22,30,32 |
| <u>Alexander Reid & Co., 40 S.E.C. 986 (1962).....</u> | 16 |
| <u>Rogen v. Ilikon Corp., 361 F. 2d 260 (C.A. 1, 1966).....</u> | 12 |
| <u>Henry P. Rosenfeld, 30 S.E.C. 941 (1950).....</u> | 18 |
| <u>Ross v. Licht, 263 F. Supp. 395 (S.D. N.Y., 1967).....</u> | 18 |
| <u>San Francisco Mining Exchange v. Securities and Exchange Commission, 378 F. 2d 162 (C.A. 9, 1967).....</u> | 13,31 |
| <u>Securities and Exchange Commission v. Culpepper, 270 F. 2d 241 (C.A. 2, 1959).....</u> | 19 |
| <u>Securities and Exchange Commission v. R. A. Holman & Co., 366 F. 2d 456 (C.A. 2, 1966), rehearing denied per curiam, 377 F. 2d 665 (C.A. 2), certiorari denied, 389 U.S. 991 (1967).....</u> | 16 |
| <u>Securities and Exchange Commission v. Ralston Purina Co., 346 U.S. 119 (1953).....</u> | 19 |
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| <u>Securities and Exchange Commission v. Sunbeam Gold Mines Co., 95 F. 2d 699 (C.A. 9, 1938).....</u> | 19 |

| | <u>Pages</u> |
|---|--------------|
| <u>Securities and Exchange Commission v. Texas Gulf Sulphur Co.</u> , 401 F. 2d 833 (C.A. 2, 1968), (petition for certiorari pending)..... | 12,13 |
| <u>Securities and Exchange Commission v. Timetrust, Inc.</u> , 28 F. Supp. 34 (N.D. Cal., 1939)..... | 18 |
| <u>Standard Distributors, Inc. v. Federal Trade Commission</u> , 211 F. 2d 7 (C.A. 2, 1954)..... | 11 |
| <u>Steelco Stainless Steel, Inc. v. Federal Trade Commission</u> , 187 F. 2d 693 (C.A. 7, 1951)..... | 11 |
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| <u>Strathmore Sec., Inc. v. Securities and Exchange Commission</u> , CCH Fed. Sec. L. Rep. Par. 92,335 (C.A. D.C., Jan. 24, 1969)..... | 23 |
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| <u>William Todd, Inc.</u> , 32 S.E.C. 537 (1951)..... | 18 |
| <u>Underhill Sec. Corp.</u> , [1964-1966 Transfer Binder] CCH Fed. Sec. L. Rep., Par. 77,270 (S.E.C., Aug. 3, 1965)..... | 16 |
| <u>United States v. Riccardi</u> , 174 F. 2d 883 (C.A. 3, 1949)..... | 27 |
| <u>United States v. Ross</u> , 321 F. 2d 61 (C.A. 2, 1963)..... | 24 |
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| <u>United States v. Ward Baking Co.</u> , 224 F. Supp. 66 (E.D. Pa., 1963)..... | 27 |
| <u>United States v. Wolfson</u> , CCH Fed. Sec. L. Rep. Par. 92,328 (C.A. 2, Dec. 27, 1968)..... | 16 |

| | |
|--|----|
| <u>Universal Camera Corp. v. National Labor Relations Board</u> , 340 U.S. 474 (1951)..... | 22 |
| <u>Vanasco v. Securities and Exchange Commission</u> , 395 F. 2d 394 (C.A. 2, 1968)..... | 33 |
| <u>Vickers v. Securities and Exchange Commission</u> , 383 F. 2d 343 (C.A. 2, 1967)..... | 22 |
| <u>Winkler v. Securities and Exchange Commission</u> , 377 F. 2d 517 (C.A. 2, 1967)..... | 33 |

Statutes and Rules:

Administrative Procedure Act, as codified:

| | |
|--|----|
| Section 6, 5 U.S.C. 555(b)..... | 28 |
| Section 7(c), 5 U.S.C. 556(d)..... | 26 |
| Section 8(a), 5 U.S.C. 557(b)..... | 22 |
| Section 10(e)(B), 5 U.S.C. 706(2)..... | 10 |

Cal. Evid. Code:

| | |
|-------------------|----|
| Section 1237..... | 27 |
|-------------------|----|

Securities Act of 1933, 15 U.S.C. 77a, et seq.:

| | |
|---------------------------------------|------------|
| Section 2(11), 15 U.S.C. 77b(11)..... | 10,17 |
| Section 4(1), 15 U.S.C. 77d(1)..... | 10,17 |
| Section 4(2), 15 U.S.C. 77d(2)..... | 17 |
| Section 5, 15 U.S.C. 77e..... | 9,10,16,17 |
| Section 5(a), 15 U.S.C. 77e(a)..... | 4 |
| Section 5(c), 15 U.S.C. 77e(c)..... | 4 |
| Section 17(a), 15 U.S.C. 77q(a)..... | 3,10 |
| Section 20(b), 15 U.S.C. 77t(b)..... | 32 |

Securities Exchange Act of 1934, 15 U.S.C. 78a, et seq.:

| | |
|--|-------|
| Section 10(b), 15 U.S.C. 78j(b)..... | 3,10 |
| Section 15(b), 15 U.S.C. 78o(b)..... | 3,30 |
| Section 15(b)(5), 15 U.S.C. 78o(b)(5)..... | 10,29 |
| Section 15(b)(5)(E), 15 U.S.C. 78o(b)(5)(E)..... | 18 |

Securities Exchange Act of 1934 (continued)

| | |
|--|----------------|
| Section 15(b)(7), 15 U.S.C. 78o(b)(7)..... | 10,17,29,31,32 |
| Section 15(c)(1), 15 U.S.C. 78o(c)(1)..... | 3,10 |
| Section 15A, 15 U.S.C. 78o-3..... | 3 |
| Section 19(a)(1), 15 U.S.C. 78s(a)(1)..... | 31,32 |
| Section 21(e), 15 U.S.C. 78u(e)..... | 32 |
| Section 25(a), 15 U.S.C. 78y(a)..... | 2,10 |

Rules Under the Securities Exchange Act of 1934,
17 CFR 240.0-1, et seq.:

| | |
|-------------------------------------|------|
| Rule 10b-5, 17 CFR 240.10b-5..... | 3,10 |
| Rule 15c1-2, 17 CFR 240.15c1-2..... | 3,10 |

Rules of Practice of the Securities and Exchange Commission,
17 CFR 201.1, et seq.:

| | |
|-----------------------------------|----|
| Rule 12(a), 17 CFR 201.12(a)..... | 25 |
|-----------------------------------|----|

Miscellaneous Authorities:

| | |
|--|----|
| Assembly Committee on Judiciary, Comment, Cal. Evid. Code § 771..... | 27 |
| D. Bellemore, <u>Investments: Principles, Practices and</u> <u>Analysis</u> (2d ed. 1962)..... | 13 |
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| C. McCormick, <u>Evidence</u> (1954)..... | 27 |
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22459

WILLIAM REIGEL,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ANSWERING BRIEF OF RESPONDENT SECURITIES AND EXCHANGE COMMISSION

COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was there substantial evidence that a securities salesman willfully violated antifraud provisions of the federal securities laws when the record showed that (a) he withheld from his customers adverse financial information about the issuer of the securities he was selling, and (b) he predicted a rapid, substantial price rise for those securities on the basis of negotiations between the issuer and others, when he had no reason to believe the negotiations would result in agreement or, if so, whether the agreement would be profitable for the issuer?

2. Was there substantial evidence that a securities salesman willfully participated in violations of provisions of the federal securities laws prohibiting the sale of unregistered stock when the record showed that he procured the stock that his employer unlawfully

sold under circumstances indicating such sales would occur?

3. When the Securities and Exchange Commission, on independent review and evaluation of the record in an administrative proceeding, found, on the basis of substantial evidence in the record, serious and willful violations of law and imposed a sanction authorized by statute, is its order subject to reversal because (a) matters considered by the hearing examiner, but expressly disregarded by the Commission, may have been objectionable; (b) a respondent in the proceeding had chosen to represent himself during the earlier stages of the hearings but did employ counsel in subsequent stages; (c) prior to the hearing the recollection of witnesses against the respondent had been refreshed by accurate memoranda of their prior statements; or (d) the sanction imposed by the Commission against the respondent was more stringent than the sanction that would have been imposed by the hearing examiner?

COUNTERSTATEMENT OF THE CASE

William Reigel ("Reigel") has petitioned this Court, pursuant to Section 25(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78y(a), to review an order of the Securities and Exchange Commission by which he has been barred from further association with any broker or dealer in securities. ^{1 /} The order was entered at the conclusion

^{1 /} The Commission's order, dated July 14, 1967 (R. 2012), was based upon its findings and opinion of the same date (R. 2000-2011). A Memorandum Opinion and Order Denying Rehearing, Leave to Adduce Additional Evidence, and Stay was subsequently entered on November 1, 1967 (R. 2013-2017).

The record before the Commission is cited in this brief as "R. ____." Reigel's opening brief in this Court is cited as "Br. ____."

of administrative proceedings conducted by the Commission pursuant to Sections 15(b) and 15A of the Exchange Act, 15 U.S.C. 78o(b), 78o-3.

The respondents in the proceedings were Century Securities Company ("Century"), which had been registered with the Commission as a broker and dealer in securities, that firm's two general partners and six individuals, including Reigel, who had been its sales representatives.^{2/}

The proceedings were held to determine, among other things, whether the respondents had willfully violated antifraud provisions of the Securities Act of 1933 ("Securities Act") and of the Exchange Act^{3/} in the offer and sale of securities issued by Jayark Films Corporation ("Jayark"), and whether some of them had, as well, violated the registration provisions of the Securities Act in selling Jayark stock.

After the order for proceedings (R. 1228-1232) had been served by mail on October 20, 1964 (R. 1233-1241), answers that were, in effect, general denials were filed by all respondents (R. 1243-1260), including Reigel (R. 1246). Upon notice (R. 639-640; 1274)^{4/} and after a preliminary conference (R. 1a-1t), evidentiary hearings were held in

^{2/} Another salesman, Robert W. Nees, has also petitioned this Court for review of the Commission's order. That petition has been docketed as No. 22487.

^{3/} Section 17(a) of the Securities Act, 15 U.S.C. 77q(a), and Sections 10(b) and 15(c)(1) of the Exchange Act, 15 U.S.C. 78j(b) and 78o(c)(1), as well as Rules 10b-5 and 15c1-2, 17 CFR 240.10b-5 and 240.15c1-2, promulgated by the Commission under the latter statute.

^{4/} This notice is a subject of dispute in No. 22487. Reigel, however, makes no claim that he failed to receive timely notice of the hearings.

August 1965 (R. 1u-544). The Commission's staff produced two of Reigel's customers as witnesses against him at the hearings (R. 138-164). Although Reigel voluntarily appeared without counsel (R. 1286), he actively participated in the hearings, cross-examining the customer-witnesses who testified against him (R. 147-152, 161-163) and examining a witness for the defense (R. 511-515). Reigel did not, however, take the stand in his own behalf (R. 518-519). When the hearings were later reopened in February 1966, Reigel was represented by counsel (R. 1571), who participated in the cross-examination (R. 569-575, 582-590).^{5/} Reigel's counsel did not seek leave to call him to the stand or otherwise supplement his defense at the reopened hearings.

On August 31, 1966, the hearing examiner filed an initial decision in which he found, among other things, that, in the sale of registered Jayark stock, Century, its owners and salesmen had willfully violated the antifraud provisions of the Securities Act and the Exchange Act (R. 1696, 1702).^{6/} He found also that Century's owners had, with the assistance of Reigel, willfully violated Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. 77e(a), (c), in the offer and sale of unregistered Jayark stock (R. 1680). The examiner recommended that Century's registration be revoked and its owners barred from further association

5/ The circumstances under which the hearings were reopened are described in detail in our answering brief (pp. 3-4) in No. 22487.

6/ Century and its owners were found also to have violated other rules under the Exchange Act (R. 1696).

with any broker or dealer in securities; he recommended also that one salesman be barred from such association, that Reigel and another salesman be suspended from association with any broker or dealer for six months and that a third salesman be censured (R. 1704).^{7/}

The Commission made an independent review of the entire record (R. 2001). Although the hearing examiner had relied in part on an adverse inference from the failure of Reigel and other respondents to testify (R. 1691), the Commission expressly disclaimed any such reliance and based its decision solely upon the affirmative evidence in the record (R. 2009). It found this evidence to establish that, during the period between May 1963 and April 1964, Century, through its salesmen, "sold at retail a total of about 73,700 shares of Jayark stock at prices ranging generally from 5 to 7-3/4" (R. 2002), and

"that respondents [including Reigel] engaged in a scheme to defraud investors by means of a persistent high-pressure campaign over the telephone to sell the speculative stock of Jayark, which involved the use of fraudulent representations and predictions. The similarity of the representations made indicates that the salesmen had a standard sales 'pitch'" (R. 2001-2002).

Jayark was a distributor of programs and motion pictures for television presentation (R. 965-967). The Commission found, and Reigel does not dispute, that Jayark's financial condition "was materially adverse" (R. 2003). During the year ended May 31, 1963, Jayark had suffered an operating loss of more than \$60,000 (R. 958) and on that date had a deficit of about \$100,000 (R. 957). A research report under Century's

^{7/} Two salesmen originally named as respondents were not the subject of the hearing examiner's conclusions. The Commission had accepted the terms of a settlement offered by one (R. 1261-1273; 1996-1997), and had entered a default against another who had not appeared at the hearings (R. 1998-1999).

letterhead, dated June 1963, showed that Jayark had suffered a net operating loss of \$21,615 during the five-month period ended October 31, 1962--a loss more than four times greater than the loss sustained for the comparable period a year earlier (R. 966).

The Commission found that, notwithstanding Jayark's serious financial difficulties, "no financial information was given [by the respondents, including Reigel] to any of the customer-witnesses prior to their purchases" (R. 2003). Indeed, in response to a direct question "about the financial background" of the company Reigel told a woman who had never before bought a speculative security (R. 149) that "everything was quite stable, quite satisfactory" (R. 140), and that "everything was absolutely perfect" (R. 141). Reigel apparently concedes that the investors who testified to the manner in which he induced their purchases were not provided with financial information until after their purchases had been made (Br. 12, 38-40; see R. 156, 163). In addition, he does not dispute that he knew the true facts of Jayark's condition, having been told of its deficit (R. 446) and having received copies of the various pertinent reports as they were prepared (R. 445).

Reigel not only kept this adverse information about Jayark to himself; he admits having predicted "a future rise in the price of Jayark stock" to two witnesses (Br. 10). The uncontroverted record shows that Reigel told one woman, who relied upon his statements in buying 500 shares of Jayark (R. 140, 150), that "they were going to merge with a television company who had a backlog of thousands

of pictures, and as soon as it was merged, within two weeks, the stock would go sky high, at least triple" (R. 140, 141, 151-152). Another woman, who told Reigel that she hoped to double her investment within six months was advised by him that to do so she should buy as much Jayark stock as she could; she bought 200 shares (R. 156-158).

Although Reigel talked in terms of a prospective merger, there was no evidence that a merger might occur; but the Commission recognized that there was credible testimony that Jayark was negotiating for the television rights to film libraries owned by Samuel Goldwyn Productions and Paramount Pictures Corporation (R. 2003, 2004). The Commission found it unnecessary to resolve a conflict in the testimony as to whether an oral agreement had actually been reached, because it found that the respondents, including Reigel, "had no knowledge of the terms of any agreement with Goldwyn, of the nature and quality of the film library, or of the other pertinent considerations making for the success or failure of such a venture" (R. 2004). Similarly, it found that "respondents had no information necessary to an informed judgment as to the prospect of Paramount leasing its films to Jayark, and, if so, as to whether such arrangement would prove to be successful" (R. 2004). On this basis, the Commission found that the "respondents had no adequate basis for their optimistic representations regarding the acquisition of film libraries" (R. 2003).^{8/}

^{8/} Although Reigel recites the information known to those who had been involved in the negotiations (Br. 10-11, 43-45), he does not even now claim that he or any of the respondents were privy to all or any significant part of that information when he dealt with the investor-witnesses who testified against him.

The Commission also noted that it had "repeatedly held that predictions of substantial price increases within relatively short periods of time with respect to a speculative security are inherently fraudulent whether expressed in terms of opinion or fact" (R. 2003). Thus, the Commission concluded that the affirmative evidence in the record demonstrated that Reigel had willfully violated and aided and abetted violations of the antifraud provisions of the Securities Act and of the Exchange Act (R. 2001).

The Commission also found that Reigel had willfully participated in a public distribution of unregistered Jayark securities by Century. It was stipulated at the prehearing conference by Reigel, among others, that in September 1963 Century had purchased 3,750 shares of Jayark stock from persons who, at all pertinent times, were controlling stock-^{9/}holders of that company. It was also agreed that, although none of those shares had been registered with the Commission under the Securities Act, Century had applied some of that stock to cover earlier short sales to public investors and had sold the balance to other members of the investing public in small lots (R. 1q-1r, 8-9). The Commission noted that Reigel "did not himself sell any of the [unregistered shares to the public]" (R. 2008); but the record shows, and he has never disputed, that he arranged for the acquisition of these shares by Century with full knowledge that they were not registered (R. 642, 646-647). Reigel does not claim that he was unaware of the seller's controlling

^{9/} Although the record of the prehearing conference recites the year as 1964, the fact that 1963 was intended is clear from the several related exhibits accepted in evidence (R. 642-647, 669-670, 691).

position in Jayark, a fact that would have made registration necessary unless Century was taking the stock without any expectation of distributing it (see p. 17, infra).^{10/} With regard to Reigel's knowledge of Century's intentions in purchasing this Jayark stock, there is undisputed evidence in the record as to the firm's dominant market position in the stock and heavy trading activity (R. 50, 671-701), as well as testimony that showed Jayark to have been a stock of particular interest to Reigel (R. 458-459) and exhibits showing that Reigel had been selling Jayark stock for the firm's account only a few months earlier (R. 985, 987). On this basis, the Commission found that Reigel "must have known that . . . [Century], which was making a market in Jayark stock, was acquiring the shares with a view to distribution" (R. 2008). It therefore concluded that "Reigel participated in the violations of Section 5" by Century (R. 2008).

In determining the sanctions to be imposed on Reigel and the other respondents, the Commission noted that Century and its owners had committed extensive violations, and that all the salesmen had engaged in fraudulent selling activities of a grave character. It thus concluded, particularly in the absence of any mitigative factors, that there was no basis for the differing sanctions recommended by the hearing examiner, revoked Century's registration and entered a bar

^{10/} Reigel was told by the seller that he had an opinion of counsel that registration was not required (R. 642). The opinion did not, however, purport to cover subsequent sales by a purchaser from the controlling person (R. 642). It was based on the inapplicable assumption that a securities firm would be acting as broker for the controlling persons rather than, as occurred, purchase the unregistered securities for its own account as a dealer (R. 1172). Reigel did not request a copy of the opinion letter; Century obtained a copy only after the administrative proceedings had been instituted (R. 414-417, 1170-1172).

order against all of the individual respondents who had participated in the hearings (R. 2011).

STATUTES AND RULES INVOLVED

Sections 2(11), 4(1), 5 and 17(a) of the Securities Act, Sections 10(b), 15(b)(5) and (7), 15(c)(1) and 25(a) of the Exchange Act and Rules 10b-5 and 15c1-2 under the latter Act are set forth in the statutory appendix (see pp. 1a-4a, infra).

ARGUMENT

I. THE COMMISSION'S FINDINGS THAT REIGEL ENGAGED IN WILLFUL VIOLATIONS OF THE FEDERAL SECURITIES LAWS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Court's jurisdiction is based upon Section 25(a) of the Securities Exchange Act. That section provides, among other things, that "the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." And Section 10(e)(B) of the Administrative Procedure Act, as codified, 5 U.S.C. 706(2), provides that a reviewing court may "set aside agency action, findings, and conclusions found to be . . . (E) unsupported by substantial evidence" Thus, this Court has recognized that in proceedings such as this "the scope of . . . [its] review is to determine if the Commission's findings are supported by substantial evidence." Pierce v. Securities and Exchange Commission, 239 F. 2d 160, 162 (1956).

The Supreme Court has held that under the substantial evidence test a court that is reviewing agency action may not properly attempt to

determine where the weight of the evidence adduced before the agency lies. Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-621 (1966). It is the Commission that has the responsibility both of resolving conflicts in the evidence and of drawing the necessary in-^{11/}ferences from the record. And one who challenges an agency's conclusions before a court of appeals must specifically designate those findings that he claims are unsupported by substantial evidence and must meet the burden of showing that this is so. North Whittier Heights Citrus Ass'n v. National Labor Relations Board, 109 F. 2d 76, 83^{12/} (C.A. 9), certiorari denied, 310 U.S. 632 (1940).

A. Reigel Willfully Violated Antifraud Provisions in the Sale of Registered Jayark Stock.

In substance, the antifraud provisions of the federal securities laws that Reigel and the other respondents were found to have violated prohibit any untrue statement or misleading omission of a material fact and any other conduct that "operates or would operate as a fraud or deceit" in connection with a securities transaction. Reigel does not

^{11/} Archer v. Securities and Exchange Commission, 133 F. 2d 795, 799 (C.A. 8), certiorari denied, 319 U.S. 767 (1943); see Hartford Gas Co. v. Securities and Exchange Commission, 129 F. 2d 794, 796 (C.A. 2, 1942); cf., e.g., National Labor Relations Board v. Marcus Trucking Co., 286 F. 2d 583, 591-592 (C.A. 2, 1961); Standard Distributors, Inc. v. Federal Trade Commission, 211 F. 2d 7, 12 (C.A. 2, 1954).

^{12/} See, e.g., Keele Hair & Scalp Specialists, Inc. v. Federal Trade Commission, 275 F. 2d 18, 21 (C.A. 5, 1960); Steelco Stainless Steel, Inc. v. Federal Trade Commission, 187 F. 2d 693, 695 (C.A. 7, 1951).

claim that he was unaware of the "materially adverse" financial condition of Jayark at the time he was selling its stock. He offers no explanation for his affirmative representations that Jayark was in good financial condition (see page 6, supra).

In defense of his failure to disclose Jayark's recent losses and substantial deficits, Reigel contends that his customers would not have been interested in such information, pointing to the fact that they failed to rescind the transactions when such information was available to them (Br. 38-40). Customers should not have to study subsequently delivered literature, however, to check up on whether their security salesman has been honest with them.^{13/} And it certainly cannot be assumed, at least in the absence of specific testimony of the customer to that effect, that facts relating significantly to the financial condition of a company would be immaterial.^{14/} Moreover, this is a remedial proceeding to protect investors in the future, not an action in damages to recompense investors actually injured by Reigel's past misconduct. Thus, it is not necessary for the Commission to prove that any investors actually relied upon Reigel's

^{13/} In this connection, it should be noted that Reigel was still making questionable representations about the stock to his customers (R. 143-145).

^{14/} It is generally recognized that under the antifraud provisions of the securities laws a basic test of materiality is "whether a reasonable man would attach importance . . . [to the undisclosed or misrepresented facts] in determining his choice of action in the transaction in question." E.g., Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F. 2d 833, 849 (C.A. 2, 1968) (en banc) (petitions for certiorari pending); Rogen v. Ilikon Corp., 361 F. 2d 260, 266 (C.A. 1, 1966).

misrepresentations and omissions.

Reigel's argument that persons who speculate in securities are not interested in financial information about the issuers was rejected by the very Congress that adopted the Exchange Act. As the House committee wrote, "[N]o speculator . . . can safely buy and sell securities . . . without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells." H.R. Rep. No. 1383, 73d Cong., 2d Sess. (1934), p. 11. ^{16/} Accordingly, it has recently been stated that speculators "are also 'reasonable' investors entitled to the same legal protection afforded conservative traders." Securities and Exchange Commission v. Texas Gulf Sulphur Co., supra, 401 F. 2d at 849 (footnote omitted).

The Commission found all the respondents to have made "predictions of substantial price increases within relatively short periods of time" (R. 2003). Certainly there is evidence of this as to Reigel. See, for example, the uncontroverted testimony of one witness who repeatedly stated--even upon cross-examination by him--that he had told her that the price would "at least triple" within a short period of

^{15/} E.g., Berko v. Securities and Exchange Commission, 316 F. 2d 137, 143 (C.A. 2, 1963); Hughes v. Securities and Exchange Commission, 174 F. 2d 969, 973-974 (C.A. D.C., 1949); cf. San Francisco Mining Exchange v. Securities and Exchange Commission, 378 F. 2d 162, 165 (C.A. 9, 1967); Farrell v. United States, 321 F. 2d 409, 419 (C.A. 9, 1963), certiorari denied, 375 U.S. 992 (1964); Bobbhoff v. United States, 202 F. 2d 389, 391 (C.A. 9, 1953).

^{16/} See D. Bellemore, Investments: Principles, Practices and Analysis 4 (2d ed. 1962).

time (R. 140-141, 151-152).^{17/}

Reigel does not even claim support in the record for his assertion in connection with a sale that "within two weeks" Jayark was going to "merge" with another company with "a backlog of thousands of pictures" (R. 140-141). Instead, he argues (Br. 43-45) that negotiations were in fact conducted, and that an agreement was actually reached for Jayark's acquisition of television rights to film libraries. Whatever the actual state of negotiations (see p. 7, supra), the uncontroverted testimony of one of Century's partners shows that Reigel and the others at Century knew very little about the prospective deal: They knew that negotiations were in progress, but they "had no knowledge

^{17/} Although the witness admitted that it might have been her characterization of Reigel's claims that the stock was "going to the moon" (R. 151), her testimony is extremely clear that Reigel told her that the price of the stock would shortly triple (R. 140-141, 151-152). The ambiguous phrasing of the argument made on page 41 of Reigel's brief might erroneously suggest otherwise.

Based solely upon a customer's affirmative response to a leading question (R. 152), Reigel also argues (Br. 41) that his predictions were conditioned upon the consummation of the merger. But he told the same customer without qualification that the deal would go through in two weeks (R. 140-141). Of course, even if a securities salesman were allowed to escape liability in some circumstances by couching predictions in conditional terms, he would still be required to have a reasonable basis, not evident on this record, for concluding that the prediction would come true if the condition should come to pass.

of the actual ending of negotiations," or that any "deal was closed"
18/
(R. 445). Thus, Reigel seems to be taking the rather remarkable
position that, based solely upon his knowledge of the fact of negotia-
tions, he was entitled to infer that an agreement would be reached and
so predict to investors and was also justified in concluding and
predicting that, once entered, the agreement would appear so advan-
tageous to Jayark that the price of the stock would promptly triple.
Since much more information than was available to Reigel and the
other respondents would be necessary to determine the profitability
of the venture that they glowingly described to investors, the Commis-
sion quite properly concluded that they "had no adequate basis for
their optimistic representations regarding the acquisition of film
libraries" by Jayark (R. 2003).

18/ Reigel asserts (Br. 45) the existence of "evidence in the record
that Reigel was aware of the status of these negotiations at the
time of his making any representations to the purchasers. . . ." His
citations to the record, however, do not support the assertion.
It was testified that the respondents had not been directly
involved in the negotiations but had relied upon information
provided by the principals (R. 444-445). Although it had been
agreed that letters were received from the president of Jayark
(R. 427), only one of them, Respondents' Exhibit E (R. 1174-1175),
was introduced "as an indication of the nature of the advice
received" (R. 427). Aside from assertions of optimism, that
letter revealed little more than the existence of the negotiations,
and there was no indication that other letters were more informa-
tive. More significantly, that letter, which was received after
Reigel had made the sales found to have been fraudulent, cautioned
that "there is no way of knowing, of course, whether these
negotiations will succeed . . ." (R. 1174).

It has always been considered a violation of the antifraud provisions for a broker-dealer or associated person to represent to his customers that a security will soon appreciate in value or make any other material representations if he does not have an adequate basis for such predictions and representations.^{19/} And the Commission has repeatedly held that predictions of a substantial increase of the price of a speculative security within a relatively short period of time are inherently fraudulent and cannot be justified.^{20/} As one court has aptly noted, "'[N]o reliable expert technique has yet been developed or perhaps can ever be developed to ascertain with any degree of accuracy the future market price of securities or the effect of events upon it.'" United States v. Wolfson, CCH Fed. Sec. L. Rep., Par. 92,328, at 97,575 (C.A. 2, Dec. 27, 1968).

B. Reigel Willfully Participated in the Public Distribution of Unregistered Jayark Stock.

Section 5 of the Securities Act prohibits the sale of unregistered securities by use of the mails or interstate means unless some

^{19/} E.g., R. A. Holman & Co. v. Securities and Exchange Commission, 366 F. 2d 446, 449-450 (C.A. 2, 1966), amended per curiam in other respects, 377 F. 2d 665 (C.A. 2), certiorari denied, 389 U.S. 991 (1967); Securities and Exchange Commission v. R. W. Holman & Co., 366 F. 2d 456, 458 (C.A. 2, 1966), rehearing denied per curiam, 377 F. 2d 665 (C.A. 2), certiorari denied, 389 U.S. 991 (1967); Berko v. Securities and Exchange Commission, supra, 316 F. 2d at 143.

^{20/} E.g., R. Baruch & Co., Securities Exchange Act Release No. 7932, p. 6 (Aug. 9, 1966); Underhill Sec. Corp., [1964-1966 Transfer Binder] CCH Fed. Sec. L. Rep., Par. 77,270, at 82,415 (S.E.C., Aug. 3, 1965); Aircraft Dynamics Int'l Corp., 41 S.E.C. 566, 570 (1963); Alexander Reid & Co., 40 S.E.C. 986, 991 (1962).

exemption is available. The only exemption that could be available here is that in Section 4(1) of that act for "transactions by any person other than an issuer, underwriter, or dealer."^{21/} The Commission found that Century was an underwriter within the meaning of Section 2(11), since it purchased the Jayark stock in question from a controlling person "with a view to . . . the distribution" of the securities; namely, to cover its existing short position and to make additional sales to the public (R. 2007). These sales therefore violated Section 5.

The Commission found the record to establish "that Reigel participated in the violation of Section 5" of the Securities Act committed by Century and its owners (R. 2008). Reigel does not dispute his central role in Century's acquisition of unregistered Jayark stock, nor does he deny that the stock's public distribution by Century was a violation of that section. He contends only that he did not himself effect a sale of the unregistered securities (Br. 31-32), and that, in any event, his conduct in connection with the Section 5 violations was not "willful" (Br. 32-37).

The fact that Reigel did not himself effect a sale of the unregistered Jayark stock is not significant in the light of the Commission's finding that he participated in the violation of Section 5 by arranging for the acquisition of the shares to be sold. Section 15(b)(7) of the Exchange Act, 15 U.S.C. 78o(b)(7), when read with

^{21/} The so-called private offering exemption of Section 4(2), 15 U.S.C. 77d(2), only applies to "transactions by an issuer."

Section 15(b)(5)(E), 15 U.S.C. 78o(b)(5)(E), expressly authorizes the Commission to take remedial action against any person who "has willfully aided, [or] abetted . . . the violation by any other person of the Securities Act of 1933" It is not necessary to determine whether these provisions, enacted in 1964, were ^{22/}intended to have a retroactive effect, since they merely codified existing law. That the participation by a person associated with a broker-dealer in a firm's unlawful conduct constituted aiding and abetting the violation and provided a basis for remedial action against the associated person had already been the Commission's long-standing interpretation ^{23/} tacitly approved by the courts. ^{24/} Congress

^{22/} E.g., M. G. Davis & Co. v. Cohen, 256 F. Supp. 128, 133-135 (S.D. N.Y.), affirmed on other grounds, 369 F. 2d 360 (C.A. 2, 1966); see R. Phillips & M. Shipman, An Analysis of the Securities Acts Amendments of 1964, 1964 Duke L. J. 706, 809, 815 (1964).

^{23/} See, e.g., Luckhurst & Co., 40 S.E.C. 539 (1961); Mason, Moran & Co., 35 S.E.C. 85 (1953); William Todd, Inc., 32 S.E.C. 537 (1951); Henry P. Rosenfeld, 30 S.E.C. 941, 944 n.3 (1950); Burley & Co., 23 S.E.C. 461, 468 n.11 (1946).

^{24/} See Batten & Co. v. Securities and Exchange Commission, 345 F. 2d 82 (C.A. D.C., 1964); Barnett v. United States, 319 F. 2d 340 (C.A. 8, 1963); Securities and Exchange Commission v. Scott Taylor & Co., 183 F. Supp. 904, 909 n.12 (S.D. N.Y., 1959); Securities and Exchange Commission v. Timetrust, Inc., 28 F. Supp. 34, 43 (N.D. Cal., 1939).

The courts have also applied the aiding and abetting doctrine under other provisions of the securities acts without any explicit statutory authority. See Ross v. Licht, 263 F. Supp. 395, 410 (S.D. N.Y., 1967) (alternative holding); Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 682 (N.D. Ind., 1966), adhered to, 286 F. Supp. 702, 725 (N.D. Ind., 1968); Pettit v. American Stock Exchange, 217 F. Supp. 21, 28 (S.D. N.Y., 1963).

recognized the existence of this doctrine and expressly approved it when it enacted Section 15(b)(5)(E). As the Senate Committee explained:

"In a number of cases, the Commission has held that an individual participated in violations by a broker or dealer as an aider and abettor, and the proposed change in clause (E) . . . would codify this practice and clarify the basis for it."

S. Rep. No. 379, 88th Cong., 1st Sess. (1963), p. 76.

It has consistently been held that a decision to act when the relevant facts are known constitutes willfulness. For this purpose it is not necessary to show that the violator gave any consideration to the lawfulness or unlawfulness of his actions.^{25/} Indeed, if an inquiry that a person should have made would have disclosed such relevant facts, it is not necessary for this purpose even to show that he actually knew them.^{26/} And his duty to investigate is particularly clear when a claim of exemption from registration is made, since the law places the burden of proof upon the person seeking to rely upon the exemption. Securities and Exchange Commission v. Ralston Purina Co., 346 U.S. 119, 126 (1953); Securities and Exchange Commission v. Sunbeam Gold Mines Co., 95 F. 2d 699, 701 (C.A. 9, 1938).^{27/}

^{25/} See, e.g., Gearhart & Otis, Inc. v. Securities and Exchange Commission, 348 F. 2d 798, 802-803 (C.A. D.C., 1965); Tager v. Securities and Exchange Commission, 344 F. 2d 5, 8 (C.A. 2, 1965).

^{26/} See, e.g., Dlugash v. Securities and Exchange Commission, 373 F. 2d 107, 109-110 (C.A. 2, 1967); Barnett v. United States, 319 F. 2d 340, 343 (C.A. 8, 1963); United States v. Schaefer, 299 F. 2d 625, 629 (C.A. 7), certiorari denied, 370 U.S. 917 (1962); Stone v. United States, 113 F. 2d 70, 74-75 (C.A. 6, 1940) (dictum); cf. Securities and Exchange Commission v. Culpepper, 270 F. 2d 241, 251 (C.A. 2, 1959).

^{27/} Accord, e.g., Gilligan, Will & Co. v. Securities and Exchange Commission, 267 F. 2d 461, 467 (C.A. 2), certiorari denied, 361 U.S. 896 (1959).

Reigel is plainly incorrect in suggesting (Br. 34-36) a virtual lack of responsibility on the part of a securities salesman to inquire concerning the propriety of transactions in which he is requested to participate in connection with his employment. Section 15(b) of the Exchange Act establishes standards to which "any person" who seeks to enter or to continue employment in the highly sensitive securities field must conform. Of course, it may be that salesmen, by virtue of their subordinate roles, may not be in a position to know everything that their superiors readily can and do ascertain. Such cannot be said to be the case here, however. Having been with Century since prior to the time that it had underwritten a public distribution of securities by Jayark (R. 459), Reigel plainly knew or had reason to know that the sellers were at all pertinent times "officers, directors, and controlling stockholders of Jayark Films" (R. 1q). Furthermore, he had been informed that the shares they offered were not registered (R. 642). In view of Century's dominant market position and heavy trading activity in Jayark stock (R. 50, 671-701) and his own interest in it (R. 459), Reigel could not have believed that Century was taking the stock for investment. Accordingly, there was substantial evidence for the Commission's finding that Reigel "must have known that registrant [Century] . . . was acquiring the shares with a view to distribution" (R. 2008).

Reigel had no right to rely on the conclusory statement of Kaufman, president of Jayark, that the latter had been advised by

company counsel that the "shares are exempt from SEC registration under existing regulations . . ." (R. 642), without asking to see the opinion or inquiring as to its basis. The opinion was in fact inapplicable because it assumed that any securities firm would be acting as a broker rather than as a dealer for its own account (R. 1172); moreover, it purported to cover only the initial sale by the controlling person, not subsequent sales by others (R. 1172). In any event, there may be a finding of willfulness even when an opinion of counsel has been examined and purports to apply to a particular transaction.^{28/}

II. REIGEL WAS ACCORDED A FAIR HEARING.

A. The Commission Did Not Draw an Adverse Inference from Reigel's Failure to Testify.

Reigel argues (Br. 13-20) that no adverse inference may properly be drawn from his failure to testify, emphasizing that the hearing examiner did draw such an inference (R. 1691). But the Commission based its findings "upon an independent review of the record" (R. 2001) and explicitly stated that

" . . . in making our findings with respect to . . . Reigel [and others] . . . we have not relied on any adverse inference from their failure to testify, but based our determination solely on the evidence in the record" (R. 2009).

^{28/} 2 L. Loss, Securities Regulation 1309 (2d ed. 1961); cf., e.g., United States v. Schaefer, supra, 299 F. 2d at 630-631.

Under Section 8(a) of the Administrative Procedure Act, as codified, 5 U.S.C. 557(b), on "review of the initial decision, the agency has all the powers which it would have in making the initial decision" It is thus the Commission's findings, not those of the examiner, that are the subject of review before this Court; and the hearing examiner's conclusions are of limited relevance in this regard. Pierce v. Securities and Exchange Commission, ^{29/}supra, 239 F. 2d at 162-163. Although a reviewing court must "determine the substantiality of evidence on the record including the examiner's report," Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 493 (1951), an examiner's initial decision is significant only because "the substantiality of evidence must take into account whatever in the record fairly detracts from its weight," 340 U.S. at 488. Thus, the Supreme Court reasoned that

" . . . evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the . . . [agency's] than when he has reached the same conclusion."
340 U.S. at 488 (emphasis added).

Where, as here, the conclusions of the Commission and the examiner are in accord, however, it follows that the fact that the examiner considered additional factors as supporting his decision cannot detract from the Commission's conclusions, and the Commission's treatment of the examiner's decision should be a matter of no concern to this

^{29/} Accord, e.g., Vickers v. Securities and Exchange Commission, 383 F. 2d 343 (C.A. 2, 1967).

Court. This is precisely the approach recently taken by the Court of Appeals for the District of Columbia Circuit in a similar situation involving the Commission. Strathmore Sec., Inc. v. Securities and Exchange Commission, CCH Fed. Sec. L. Rep., par. 92,335, at 97,605 n.2 (Jan. 24, 1969). Accordingly, it is unnecessary for this Court to decide whether the hearing officer, on the basis of N. Sims Organ & Co. v. Securities and Exchange Commission, 293 F. 2d 78, 80-81 (C.A. 2, 1961), certiorari denied, 368 U.S. 968 (1962), correctly drew an inference from Reigel's failure to testify (R. 1691).

In any event, there is no basis in the record for Reigel's assertion that the hearing examiner induced Reigel's silence by permitting "inquiry into irrelevant and prejudicial areas" during the testimony of Fred Colton, another of the respondents (Br. 4-5, 14-16). Immediately after Colton's testimony Reigel and the other respondents who were present indicated that they did intend to take the stand in their own defense (R. 470F). When they changed their minds and declined to testify the next day, Colton made the fragmentary statement relied on by Reigel (Br. 15 n.1) that the respondents were "reluctant to take the stand" because there had been cross-examination as to matters allegedly "outside the scope and period covered by the

charges . . ." (R. 518). This statement was never completed, however, despite the hearing examiner's insistence that Colton finish his remarks to make sure that no rights were prejudiced (R. 518-519). Reigel himself gave no explanation of his silence, although he inquired and was assured that he could file a brief (R. 519). The hearing examiner had expressly reserved decision on the issue raised during the Colton testimony, supra, and in his initial decision he subsequently ruled against the position urged by the Commission's staff (R. 1696 n.48).^{29a/} Even if it could be assumed that Reigel's failure to testify had been caused by some misunderstanding about the legal implications of the examiner's reservation of decision, and that a layman (as distinguished from an attorney) might take matters in his own hands and simply decline to testify rather than pursue his objections in the usual fashion, such an assumption would not avail Reigel here. Before the record was reopened, inter alia, for testimony by another respondent, Reigel was represented by an attorney who was clearly aware of the prior events (R. 610-611). Reigel's attorney could have asked similar relief for his client and urged the hearing examiner to decide the

^{29a/} The hearing examiner distinguished United States v. Ross, 321 F. 2d 61, 67 (C.A. 2, 1963), where it had been held proper in a criminal case to cross-examine a defendant securities salesman to rebut "a claim of ignorance and innocence by showing . . . [the defendant] had long drifted among houses selling similarly worthless stock by similar methods."

reserved question so that he could determine whether Reigel should take the stand. If not satisfied with the ruling, he could have sought interlocutory review by the Commission. See Rule 12(a) of the Commission's Rules of Practice, 17 CFR 201.12(a). Instead, he apparently decided to rest on the record as it stood and to use this alleged error to attack the hearing examiner's decision on the merits if it turned out adverse to Reigel.

3. The Commission Did Not Rely upon Hearsay Evidence.

In connection with its determination that the "[r]espondents had no adequate basis for their optimistic representations regarding the acquisition [by Jayark] of film libraries," the Commission noted evidence in the record that was conflicting as to when and whether there had been a "deal" between Jayark and Goldwyn, and, in that connection, referred to a certain letter from Goldwyn's counsel that had been admitted into evidence without objection (R. 2003). The Commission, however, did not make any finding with respect to the conflicting evidence; its holding on this point was based on the fact that there was no showing "how profitable the Goldwyn transaction if consummated would have been to Jayark . . ." (R. 2004) and, as noted at page 7, supra, that "respondents had no knowledge of the terms of any agreement with Goldwyn, of the nature and quality of the film library, or of any of the other pertinent considerations making for the success or failure of such a venture." In this context, the Commission's reference

to the letter from Goldwyn's counsel could not have been prejudicial, since the Commission did not rely upon it.

In any event, as petitioner concedes (Br. 26), "technical rules of evidence do not apply in an administrative proceeding." See Section 7(c) of the Administrative Procedure Act, as codified, 5 U.S.C. 556(d); Federal Trade Commission v. Cement Institute, 333 U.S. 683, 705-706 (1948); Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229-230 (1938).

C. There Was Nothing Improper or Prejudicial in Refreshing the Recollection of Investor-Witnesses by Showing Them Memoranda of Prior Interviews.

Reigel claims that the witnesses for the Commission's staff were "improperly educated" (Br. 24). For this conclusion he relies solely upon the fact that, prior to testifying, the witnesses were shown memoranda of their earlier interviews with Commission investigators in order to refresh their recollections (Br. 24-26). No claim is made (R. 161, 199, 279, 295) that the investigators did anything more than simply ask questions at the original interviews. Nor is any attempt made to contest the testimony that the memoranda of the interviews were highly accurate (R. 299, 360).^{30/} The record shows that, while the witnesses were on the stand, respondents were aware of the use of the memoranda, and that the only time a request

^{30/} Thus it is of no significance that the memoranda contained some unspecified pencil notations (R. 530-531).

was made to examine one of the memoranda for the purpose of cross-examining the witness, this was permitted (R. 365, 2015). It is therefore not surprising that Reigel points to no specific instance of prejudice to support his vague claim of unfairness in this regard.

It is well established that the recollection of a witness may be refreshed by showing him a memorandum of his prior statement, whether that memorandum was written by the witness himself or by some other person, and whether the memorandum was written at the time of the underlying events or later.^{31/} Reigel's only citation to the contrary

is a provision of California state law no longer in effect (Br. 25-26). He does not disclose that in the present California law "there is no restriction . . . on the means that may be used to refresh recollection." Comment--Assembly Committee on Judiciary, Cal. Evid.

^{32/}
Code § 771.

^{31/} E.g., United States v. Riccardi, 174 F. 2d 883 (C.A. 3, 1949); Dowling Bros. Distilling Co. v. United States, 153 F. 2d 353 (C.A. 6, 1946); Fanelli v. United States Gypsum Co., 141 F. 2d 216 (C.A. 2, 1944); United States v. Ward Baking Co., 224 F. Supp. 66 (E.D. Pa., 1963); C. McCormick, Evidence 14-17 (1954); 3 J. Wigmore, Evidence §§ 758-762 (3d ed. 1940).

^{32/} Indeed, the fact that the memorandum was made "by some other person for the purpose of recording the witness' statement at the time it was made" would not prevent the introduction into evidence of the memorandum itself as "past recollection recorded." Cal. Evid. Code § 1237.

D. Reigel's Election To Forego Counsel at the Initial Hearing Provides No Basis for Attack on the Commission's Decision.

Section 6 of the Administrative Procedure Act, as codified, 5 U.S.C. 555(b), provides that "a party is entitled to appear in person or by or with counsel . . . in an agency proceeding." Reigel does not contend that he was in any way deprived of this statutory right (Br. 29). Plainly there is no requirement that counsel be provided in this administrative context.^{33/} It is no fault of the Commission^{34/} that Reigel chose not to be represented by counsel at the hearings. Indeed, although he chose to represent himself at the August 1965 hearings, Reigel has had the advice of, and has been represented by, counsel at subsequent stages in the proceeding (e.g., R. 1379-1380, 1571).

Having earlier argued that the record contains various irregularities (Br. 13-28), Reigel then asserts (Br. 29) that ". . . the lack of counsel magnified the impact of the other procedural infirmities. . . ." We have already shown that there are no procedural infirmities in the record (see pp. 21-27, supra). Moreover, Reigel's counsel has only recently decided that these infirmities exist. Although he entered the case long before the hearing examiner's initial decision, and, indeed, before the record had been reopened for Robert W. Nees, he made no effort to remedy them until after an adverse decision had been handed down as to his client.

^{33/} Boruski v. Securities and Exchange Commission, 340 F. 2d 991, 992 (C.A. 2), certiorari denied, 381 U.S. 943, 944 (1965).

^{34/} Cf. Concrete Materials Corp. v. Federal Trade Commission, 189 F. 2d 359, 362 (C.A. 7, 1951).

It is also argued (Br. 30) that Reigel's decision to represent himself imposed an "affirmative duty" upon the hearing examiner "to avoid using technical language without explaining to Reigel, in lay language, the meaning of the terms." Even the isolated example that Reigel now provides in an attempt to prove his point (Br. 30 n.6) fails to support his contention.^{35/} More important, however, as the Commission noted (R. 2014-2015), the record contains a brief filed by Reigel's present counsel conceding:

"The transcript is replete with instances wherein the hearing examiner, aware of the pro per status of the Respondents, endeavored to assist them in the presentation of their case" (R. 1497).

This concession accurately reflects the hearing examiner's efforts in this regard (e.g., R. 103, 394, 421, 480).

III. THE REMEDIAL ACTION TAKEN AGAINST REIGEL WAS WELL WITHIN THE COMMISSION'S DISCRETION.

Under Sections 15(b)(5) and (7) of the Exchange Act, the Commission has been authorized by Congress, among other remedial alternatives, to

^{35/} Reigel asserts that he did not understand the significance of the hearing examiner's "decision to reserve decision," but the record shows that the hearing examiner made it clear that he would not actually admit the evidence until he had satisfied himself that it would be proper to do so (R. 469-470). He said that he wanted to examine relevant authority before making up his mind whether to consider the evidence, and that "unless and until I am sure [that it is proper], I won't take it" (R. 470).

Reigel also suggests a duty to avoid "the admission of irrelevant evidence" (Br. 30). He does not point to any "irrelevant evidence" to support this complaint, and we are not aware of any in the present record.

bar any person from being associated with a broker or dealer "if the Commission finds that such . . . barring . . . is in the public interest . . .," and that he has violated the Securities Act or the Exchange Act. All the statutory requirements for the imposition of a bar order have been met.

The Supreme Court, in American Power & Light Co. v. Securities and Exchange Commission, 329 U.S. 90, 112-113 (1946), has stated:

"It is a fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence. . . .' While recognizing that the [Securities and Exchange] Commission's discretion must square with its responsibility, only if the remedy chosen is unwarranted in law or is without justification in fact should a court attempt to intervene in the matter."

In Pierce v. Securities and Exchange Commission, supra, 239 F. 2d 160, this Court applied that "fundamental principle" to its review of an order of the Commission entered, as was the order below, pursuant to Section 15(b) of the Exchange Act. It stated:

"The Commission is given the duty to protect the public. What will protect the public must involve, of necessity, an exercise of discretionary determination. This Court ordinarily should not substitute its judgment of what would be appropriate under the circumstances in place of the Commission's judgment as to measures necessary to protect the public interest." 239 F. 2d at 163. 36/

Reigel does not appear to deny the broad discretion with which Congress has entrusted the Commission with respect to the choice of appropriate sanctions. He argues, however, that this case is different

36/ Accord, e.g., Tager v. Securities and Exchange Commission, supra, 344 F. 2d at 8-9.

because the hearing examiner recommended a lesser sanction (Br. 21-24).

We have already shown that the hearing examiner's initial decision is only one factor to be considered in reviewing the Commission's independent findings (see pp. 22-23, supra). This is particularly so when, as here, neither the demeanor of the respondent himself nor that of conflicting witnesses is in issue. Although Reigel emphasizes the importance given to the hearing examiner's findings as to demeanor and credibility (Br. 21-22), he does not point to any evidence of this character that is relevant to the propriety of the sanction imposed.

In San Francisco Mining Exchange v. Securities and Exchange Commission, supra, 378 F. 2d 162, this Court recently considered, in an analogous context, contentions remarkably similar to those that Reigel makes here. In that case the Court reviewed an order of the Commission withdrawing the registration of a national securities exchange pursuant to Section 19(a)(1) of the Exchange Act, 15 U.S.C. 78s(a)(1).^{37/}

As here, in its review of the hearing examiner's initial decision

" . . . the Commission made its own findings of fact which were substantially in accord with those made by the examiner. However, the Commission rejected the recommendation of the hearing examiner concerning the remedy to be imposed, and ordered withdrawal of the Exchange's registration." 38/

37/ That section empowers the Commission to take remedial action for the protection of investors when an exchange has committed statutory violations or failed to enforce compliance by its members. As in the case of Section 15(b)(7), the Commission may either "withdraw" (revoke) the exchange's registration or suspend it for no more than a year.

38/ The hearing examiner had recommended that the exchange be permitted to effect a complete reorganization within 90 days to avoid having its registration withdrawn. 378 F. 2d at 164.

378 F. 2d at 164. Similar to Reigel's contentions, the exchange urged that the remedy recommended by the examiner was supported by the record, and that ordered by the Commission was not. But this Court held:

"The Commission found that the Exchange was in violation of section 19(a)(1) and, in our opinion, this finding is supported by substantial evidence. Where the established facts empower an administrative agency to take particular remedial action, the determination of whether it should take that action rests within the sound discretion of the agency."

378 F. 2d at 165 (footnote omitted). Observing that the Commission had given due consideration to relevant factors, the Court concluded that "the Commission did not abuse its discretion in ordering withdrawal of the Exchange's registration," 378 F. 2d at 166.

There is nothing improper in the fact that the Commission barred each of the several respondents without reference to the disparity in culpability noted by the hearing examiner, particularly since the provisions of Section 15(b) of the Exchange Act are not penal but merely afford a means by which the public may be protected in the future from those who have shown themselves in the past to be unqualified to participate in so sensitive a field as the securities business. Pierce v. Securities and Exchange Commission, ^{39/} supra, 239 F. 2d at 163.

^{39/} Accord, Berko v. Securities and Exchange Commission, supra, 316 F. 2d at 141; Blaise, D'Antoni & Associates, Inc. v. Securities and Exchange Commission, 289 F. 2d 276, 277 (C.A. 5), rehearing denied per curiam, 290 F. 2d 688 (C.A. 5, 1961); Associated Sec. Corp. v. Securities and Exchange Commission, 283 F. 2d 773, 775 (C. A. 10, 1960). When punishment for securities laws violations is found appropriate, it is effected by the Attorney General through application of criminal sanctions. See, e.g., Section 20(b) of the Securities Act, 15 U.S.C. 77t(b); Section 21(e) of the Exchange Act, 15 U.S.C. 78u(e).

Thus, the Commission stated that

". . . the gravity of the violations found, particularly the fraud violations, when measured against the absence of any other substantial mitigative factors, convinces us that it would be inappropriate to permit any of the respondents to continue in the securities business" (R. 2011).

Since the Commission found that public interest required the least culpable of them to be barred from the securities field in the light of the factors mentioned,^{40/} it would have served no purpose for the Commission to have attempted to distinguish between the respondents.

Moreover, any attempt to compare the nature of the remedial action taken against one person with that found appropriate for another has been held to be irrelevant upon review by a court of appeals.^{41/}

The fact that prior to the hearing the Commission had accepted an offer of settlement for a 45-day suspension by another salesman has no relevance to the foregoing, particularly since he had been employed by Century for only a short period, had voluntarily

^{40/} Reigel's exclusion from the securities business is not necessarily permanent. Section 15(b)(7), pursuant to which the order barring Reigel has been entered, provides that an individual who has been barred may not become associated with a broker or dealer "without the consent of the Commission" Without any suggestion as to what the Commission in the future might do should Reigel apply, it should be noted that the Commission frequently receives applications for reentry from barred persons and sometimes grants them, usually subject to certain safeguards, when it deems the public interest no longer requires the applicant's exclusion from the securities business.

^{41/} Vanasco v. Securities and Exchange Commission, 395 F. 2d 349, 353 (C.A. 2, 1968); Winkler v. Securities and Exchange Commission, 377 F. 2d 517, 518 (C.A. 2, 1967); Dlugash v. Securities and Exchange Commission, 373 F. 2d 107, 110 (C.A. 2, 1967).

terminated his employment because he became dissatisfied with Century's method of operations and had advised his customers to sell their Jayark stock and purchase less speculative securities (R. 1996-1997).

CONCLUSION

For the reasons stated, the order of the Commission barring Reigel from association with any broker or dealer should be affirmed.

Respectfully submitted,

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Dated: February 1969

STATUTORY APPENDIX



STATUTORY APPENDIX

Securities Act of 1933

Section 2(11), 15 U.S.C. 77b(11):

SEC. 2. When used in this title, unless the context otherwise requires—

. . . .

(11) The term “underwriter” means any person who has purchased from an issuer with a view to, or offers or² sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors’ or sellers’ commission. As used in this paragraph the term “issuer” shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

Section 4(1), 15 U.S.C. 77d(1):

SEC. 4. The provisions of section 5 shall not apply to—

(1) transactions by any person other than an issuer, underwriter, or dealer.

Section 5, 15 U.S.C. 77e

SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;⁴ or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this title, unless such prospectus meets the requirements of section 10; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

Section 17(a), 15 U.S.C. 77q(a):

SEC. 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Securities Exchange Act of 1934

Section 10(b), 15 U.S.C. 78j(b):

SECTION 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 15(b)(5), 15 U.S.C. 78o(b)(5):

(5) The Commission shall, after appropriate notice and opportunity for hearing, by order censure, deny registration to, suspend for a period not exceeding twelve months, or revoke the registration of, any broker or dealer if it finds that such censure, denial, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated—

(A) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this title, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(B) has been convicted within ten years preceding the filing of the application or at any time thereafter of any felony or misdemeanor which the Commission finds—

(i) involves the purchase or sale of any security.

(ii) arises out of the conduct of the business of a broker, dealer, or investment adviser.

(iii) involves embezzlement, fraudulent conversion, or misappropriation of funds or securities.

(iv) involves the violation of section 1341, 1342, or 1343 of title 18, United States Code.

(C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, or dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(D) has willfully violated any provision of the Securities Act of 1933, or of the Investment Advisers Act of 1940, or of the Investment Company Act of 1940, or of this title, or of any rule or regulation under any of such statutes.

(E) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of the Securities Act of 1933, or the Investment Advisers Act of 1940, or the Investment Company Act of 1940, or of this title, or of any rule or regulation under any of such statutes or has failed reasonably to supervise, with a view to preventing violations of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this clause (E) no person shall be deemed to have failed reasonably to supervise any person, if—

(i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(F) is subject to an order of the Commission entered pursuant to paragraph (7) of this subsection (b) barring or suspending the right of such person to be associated with a broker or dealer, which order is in effect with respect to such person.

Securities Exchange Act of 1934

Section 15(b)(7), 15 U.S.C. 78o(b)(7):

(7) The Commission may, after appropriate notice and opportunity for hearing, by order censure any person, or bar or suspend for a period not exceeding twelve months any person from being associated with a broker or dealer, if the Commission finds that such censure, barring, or suspension is in the public interest and that such person has committed or omitted any act or omission enumerated in clause (A), (D) or (E) of paragraph (5) of this subsection or has been convicted of any offense specified in clause (B) of said paragraph (5) within ten years of the commencement of the proceedings under this paragraph or is enjoined from any action, conduct, or practice specified in clause (C) of said paragraph (5). It shall be unlawful for any person as to whom such an order barring or suspending him from being associated with a broker or dealer is in effect, willfully to become, or to be, associated with a broker or dealer, without the consent of the Commission, and it shall be unlawful for any broker or dealer to permit such a person to become, or remain, a person associated with him, without the consent of the Commission, if such broker or dealer knew, or in the exercise of reasonable care, should have known, of such order.

Section 15(c)(1), 15 U.S.C. 78o(c)(1):

(c)(1) No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of any manipulative, deceptive, or other fraudulent device or contrivance. The Commission shall, for the purposes of this subsection, by rules and regulations define such devices or contrivances as are manipulative, deceptive, or otherwise fraudulent.

Section 25(a), 15 U.S.C. 78y(a):

SECTION 25. (a) Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended

Rules Under the Securities Exchange Act of 1934

Rule 10b-5, 17 CFR 240.10b-5:

Rule 10b-5. Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Rule 15c1-2, 17 CFR 240.15c1-2:

Rule 15c1-2. Fraud and Misrepresentation

(a) The term "manipulative, deceptive, or other fraudulent device or contrivance," as used in section 15(c)(1) of the Act, is hereby defined to include any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

(b) The term "manipulative, deceptive, or other fraudulent device or contrivance," as used in section 15(c)(1) of the Act, is hereby defined to include any untrue statement of a material fact and any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, which statement or omission was made with knowledge or reasonable grounds to believe that it is untrue or misleading.

(c) The scope of this rule shall not be limited by any specific definitions of the term "manipulative, deceptive, or other fraudulent device or contrivance" contained in other rules adopted pursuant to section 15(c)(1) of the Act.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 20 1969

LEROY HERBERT RAY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

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APPELLEE'S BRIEF

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APPEAL FROM
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FOR THE CENTRAL DISTRICT OF CALIFORNIA

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TOPICAL INDEX

| | <u>Page</u> |
|---|-------------|
| Table of Authorities | ii |
| I STATEMENT OF PROCEEDINGS | 1 |
| II STATEMENT OF FACTS | 2 |
| ARGUMENT | 10 |
| I THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS | 10 |
| II THE EVIDENCE SECURED IN CONNECTION WITH DEFENDANT HOLLYFIELD'S ARREST WAS VALIDLY SEIZED | 19 |
| III A HEARING WAS CONDUCTED OUTSIDE THE PRESENCE OF THE JURY REGARDING DEFENDANT HOLLYFIELD'S MOTION TO SUPPRESS EVIDENCE, AND NO ERROR WAS COMMITTED BY NOT CONDUCTING A SECOND HEARING | 27 |
| IV THE COURT PROPERLY INSTRUCTED THE JURY WITH REGARD TO APPELLANT'S FAILURE TO TESTIFY | 31 |
| V THE QUESTIONS AND COMMENTS BY THE TRIAL JUDGE WERE PROPER AND WITHIN HIS SOUND DISCRETION | 33 |
| VI THE TRIAL JUDGE APPROPRIATELY DEFINED THE BOUNDARIES OF CROSS- EXAMINATION DURING THE TESTIMONY OF JACQUELINE ROCHELLE DUNN | 42 |
| CONCLUSION | 53 |

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page</u> |
|---|-------------|
| Alford v. United States, 282 U.S. 697 (1931) | 48 |
| Baker v. United States, 357 F.2d 11 (5 Cir. 1966) | 34 |
| Beaudine v. United States, 368 F.2d 417 (5 Cir. 1966) | 47 |
| Beck v. Ohio, 379 U.S. 89 (1964) | 22 |
| Belcher v. United States, 5 F.2d 45 (2 Cir. 1944) | 32 |
| Bell v. United States, 371 F.2d 35 (9 Cir. 1967) | 15-16 |
| Bollenbach v. United States, 326 U.S. 607 (1947) | 33 |
| Brinegar v. United States, 338 U.S. 160 (1949) | 18, 23-24 |
| Bruno v. United States, 308 U.S. 287 (1939) | 31-32 |
| Burk v. United States, 287 F.2d 117 (9 Cir. 1961), cert. denied 369 U.S. 841 (1961) | 18, 22 |
| Bursten v. United States, 395 F.2d 976 (5 Cir. 1968) | 38 |
| Carroll v. United States, 267 U.S. 132 (1925) | 18, 24 |
| Charles v. United States, 278 F.2d 386 (9 Cir. 1960) | 26 |
| Coleman v. United States, 367 F.2d 389 (9 Cir. 1966) | 31 |
| Cotton v. United States, 371 F.2d 385 (9 Cir. 1967) | 26 |

| | <u>Page</u> |
|--|-------------|
| Dagampat v. United States, 352 F. 2d 245 (9 Cir.), cert. denied 383 U.S. 950 (1965) | 22 |
| Davis v. United States, 327 F. 2d 301 (9 Cir. 1964) | 20-22, 27 |
| Diaz-Rosendo v. United States, 357 F. 2d 124 (1966), cert. denied 385 U.S. 856 (1966) | 19-20 |
| Dixon v. United States, 333 F. 2d 348 (5 Cir. 1964) | 42-43 |
| Douse v. United States, 359 F. 2d 1014 (D. C. Cir. 1966) | 12 |
| Draper v. United States, 358 U.S. 307 (1959) | 18 |
| Farkas v. United States, 2 F. 2d 644 (6 Cir. 1924) | 47 |
| Ferganchick v. United States, 374 F. 2d 559 (9 Cir. 1967) | 10-11, 15 |
| Fletcher v. United States, 313 F. 2d 137 (9 Cir. 1963), cert. denied 374 U.S. 812 (1963) | 33, 36, 39 |
| Franano v. United States, 310 F. 2d 533 (8 Cir. 1962), cert. denied 373 U.S. 940 (1962) | 39 |
| Gilbert v. United States, 307 F. 2d 322 (9 Cir. 1962), cert. denied 372 U.S. 969 | 38, 43, 49 |
| Giordenello v. United States, 357 U.S. 480 (1957) | 15 |
| Go-Bart v. United States, 282 U.S. 344 (1930) | 15 |
| Gordon v. United States, 344 U.S. 414 (1952) | 48 |
| Grant v. United States, 368 F. 2d 658 (5 Cir. 1966) | 46 |

| | <u>Page</u> |
|--|-------------|
| Griffin v. California, 380 U. S. 609 (1965) | 31 |
| Hendrix v. United States, 327 F. 2d 971 (5 Cir. 1964) | 42, 49 |
| Henry v. United States, 361 U. S. 98 (1959) | 18 |
| Hill v. United States, 261 F. 2d 483 (9 Cir. 1958) | 43, 49 |
| Johnson v. United States, 356 F. 2d 680 (8 Cir. 1966) | 24, 36, 46 |
| Jones v. United States, 362 U. S. 257 (1960) | 19 |
| Ker v. California, 374 U. S. 23 (1962) | 21-23 |
| Lipton v. United States, 348 F. 2d 591 (9 Cir. 1965) | 22 |
| Lyons v. United States, 284 F. 2d 237 (D. C. Cir. 1960) | 32 |
| McNabb v. United States, 318 U. S. 332 (1943) | 28-29 |
| Meeks v. United States, 163 F. 2d 598 (9 Cir. 1947) | 48 |
| Michelson v. United States, 335 U. S. 469 (1948) | 49 |
| Napue v. Illinois, 360 U. S. 264 (1959) | 48 |
| Nelson v. People, 346 F. 2d 73 (9 Cir. 1965) | 21 |
| Paddock v. United States, 327 F. 2d 971 (9 Cir. 1963) | 36 |
| People v. Bock Leong Chew, 142 Cal. App. 2d 400, 298 P. 2d 118 (1956) | 25 |

| | <u>Page</u> |
|--|-------------|
| People v. Chong Wing Louie, 149 Cal. App. 2d 167, 307 P. 2d 929 (1957) | 25 |
| People v. Clifton, 169 Cal. App. 2d 617, 337 P. 2d 871 (1959) | 25 |
| People v. Dabney, 250 A. C. A. 1078, 59 Cal. Rptr. 243 (1967) | 23 |
| People v. Jefferson, 230 Cal. App. 2d 151, 40 Cal. Rptr. 715 (1965) | 25 |
| People v. Langley, 182 Cal. App. 2d 89, 5 Cal. Rptr. 826 (1960) | 26 |
| People v. Layne, 235 Cal. App. 2d 188, 45 Cal. Rptr. 110 (1965) | 25 |
| People v. Lee, 260 A. C. A. 885 (1968) | 25 |
| People v. Murietta, 251 A. C. A. 1147, 60 Cal. Rptr. 56 (1967) | 23 |
| People v. Sandoval, 419 P. 2d 187, 54 Cal. Rptr. 123 (1966), cert. denied 386 U. S. 948 (1967) | 26 |
| People v. Sullivan, 242 Cal. App. 2d 767, 51 Cal. Rptr. 778 (1966) | 25-26 |
| People v. Tisby, 180 Cal. App. 2d 574, 5 Cal. Rptr. 615 (1960) | 26 |
| People v. West, 144 Cal. App. 2d 214, 300 P. 2d 729 (1956) | 21 |
| Pratti v. United States, 389 F. 2d 660 (9 Cir. 1968) | 41 |
| Redmon v. United States, 355 F. 2d 407 (9 Cir. 1966) | 20 |
| Rugendorf v. United States, 376 U. S. 528 (1964) | 24 |
| Taglavore v. United States, 291 F. 2d 262 (9 Cir. 1961) | 26 |

| | <u>Page</u> |
|---|-------------|
| Thompson v. United States, 382 F. 2d 390 (9 Cir. 1967) | 20 |
| Thurman v. United States, 316 F. 2d 205 (9 Cir. 1963) | 30, 49 |
| Thurmond v. United States, 361 F. 2d 537 (D. C. Cir. 1966) | 39 |
| United States v. Barone, 330 F. 2d 543 (2 Cir.), cert. denied 377 U.S. 1004 (1964) | 20-21, 27 |
| United States v. Birmbaum, 373 F. 2d 250 (2 Cir. 1967) | 37 |
| United States v. DiRe, 332 U.S. 581 (1948) | 22 |
| United States v. England, 347 F. 2d 425 (7 Cir. 1965) | 36 |
| United States v. Hall, 348 F. 2d 837 (2 Cir. 1965), cert. denied 382 U.S. 997 (1965) | 15-16 |
| United States v. Hill, 357 F. 2d 11 (5 Cir. 1966) | 34 |
| United States v. Kahaner, 317 F. 2d 459 (2 Cir. 1963), cert. denied 375 U.S. 836 (1963) | 52 |
| United States v. Lee, 274 U.S. 559 (1927) | 21 |
| United States v. Lefkowitz, 285 U.S. 452 (1932) | 21 |
| United States v. Page, 302 F. 2d 81 (9 Cir. 1962) | 20-21 |
| United States v. Porter, 386 F. 2d 270 (6 Cir. 1967) | 36 |
| United States v. Rabinowitz, 339 U.S. 56 (1950) | 26 |

| | <u>Page</u> |
|--|-------------|
| United States v. Ventresca, 380 U.S. 102 (1965) | 24 |
| United States v. Wade, 364 F.2d 231 (6 Cir. 1966) | 33, 42 |
| United States v. Wheeler, 256 F.2d 745 (3 Cir. 1950) | 12 |
| Ward v. United States, 353 F.2d 156 (5 Cir. 1965) | 34 |
| Wartson v. United States, F.2d (9 Cir.), No. 21,830, August 21, 1968 | 22 |
| White v. United States, 394 F.2d 49 (9 Cir. 1968) | 41, 43 |
| Wilson v. United States, 250 F.2d 157 (2 Cir. 1957) | 33 |

Statute

California Penal Code:

| | |
|------|-------|
| §836 | 22-23 |
|------|-------|

IN THE UNITED STATES COURT OF APPEALS
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LEROY HERBERT RAY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF PROCEEDINGS

On June 28, 1967, the Federal Grand Jury for the Central District of California returned an eight-count indictment naming appellant JAMES LEROY RAY and seven co-defendants. All were named as defendants in Count One charging a conspiracy to steal mail from authorized depositories, and to use the information secured from the mails to make fraudulent withdrawals from depositors' accounts. ^{1/} [C. T. 2-11.]

On November 7, 1967, a jury trial commenced before the Honorable Peirson M. Hall, United States District Judge, in which

1/ C. T. refers to Clerk's Transcript.

Leroy Herbert Ray was tried along with defendants James Hollyfield and Vincent Stafford Hill.

On November 16, 1967, the jury returned a verdict of guilty as to all defendants on all counts [C. T. 71].

On December 11, 1967, Leroy Herbert Ray was committed to the custody of the Attorney General for five years [C. T. 75]. Both defendants, Hollyfield and Hill, were also sentenced to five years' imprisonment on Count One, with their five-year sentences on the other Counts to run concurrently with the sentence on Count One, and with each other [C. T. 75].

Leroy Herbert Ray and James Hollyfield filed notices of appeal on December 12, 1967 [C. T. 78-79]. A notice of appeal was not filed on behalf of defendant Vincent Hall.

II

STATEMENT OF FACTS

During the spring of 1967, Leroy Ray and the co-conspirators planned a major scheme to steal mail matter from the United States mails and to use the banking information contained in the stolen mail to effect fraudulent withdrawals from banking institutions.

The manner in which the scheme operated followed a consistent pattern. A letter addressed to a bank or savings and loan association and containing either a passbook, account number, and speciman signatures, would be placed in the United States



mails by a depositor ^{2/} [R. T. 33-34, 49, 115, 130, 133-134].

The envelope would then be stolen from the mails [R. T. 260-261], the rifled envelope would on occasion be returned into the mails and found in another mail box or at the Terminal Annex Post Office [R. T. 445], and, lastly, the information would be used (1) either to provide a specimen name or signature for the forging of a stolen check [R. T. 369-370, 375-376], which would be cashed at a bank [R. T. 45, 47, 268], or (2) more frequently, to provide specimen signatures and the bank account numbers for fraudulent withdrawals from the account at the bank or savings and loan association [R. T. 28, 35, 52-55, 265-267].

Leroy Ray was instrumental in training runners to steal the mail from the boxes, forge specimen signatures, and enter the banks to cash the forged checks or make fraudulent withdrawals [R. T. 238-247]. One such runner was Jacqueline Rochelle Dunn.

Leroy Ray met Jacqueline Dunn in late February, 1967 [R. T. 236]. In a conversation held in a car traveling to Los Angeles International Airport, Ray explained to Miss Dunn some facets of the scheme of "working the banks" [R. T. 240]. She was to deposit an item in the bank and then take a larger sum of money out that was already on deposit [R. T. 240]. As Miss Dunn stated, "Leroy had said to me that there was nothing actually to be afraid of, that you go into the bank with the feeling that the money is yours" [R. T. 241].

^{2/} R. T. refers to Reporter's Transcript.

A short time later at the Parkway House, St. Louis, Missouri, Ray asked Miss Dunn to practice forging the signatures that would be used in fraudulent withdrawals [R. T. 245], and indicated that the account numbers "came from out of the boxes [R. T. 245].

An example of how the master scheme was put into effect can be seen from the incident involving the check of one June Banks [Gov. Ex. 1]. On April 1, 1967, John Banks mailed a check in the sum of \$123.59, endorsed by his wife, June Banks [Gov. Ex. 1], at a post office box at Willoughby and Las Palmas in Los Angeles [R. T. 33-34]. The check was for deposit at the Bank of America, Whittier, California.

That very evening the letter and its contents were among numerous others stolen in a burglary of over ten mail boxes in Hollywood [R. T. 258]. Jacqueline Dunn was a passenger in an automobile which drove from mail box to mail box in Hollywood from which numerous items of mail were stolen [R. T. 255-259]. One Clarice Berryhill was the individual who physically removed the mail from the boxes [R. T. 256].

The mail boxes were all entered with the use of a United States mail key [R. T. 256-257]. It was on October 31, 1965 that 50 such master mail keys were stolen in a burglary of the La Tijera post office in Los Angeles [R. T. 18-20]. Each of these master keys would open over 8,000 corner mail boxes in the Los Angeles area [R. T. 21].

The mail stolen on the evening of April 1, 1967 was all



sorted at a location in Los Angeles and the contents of the letter mailed by Mr. Banks were among those chosen for a fraudulent attempt to obtain money from the bank [R. T. 259-261].

On April 5, 1967, after observing Clarice Berryhill in conversation with Leroy Ray, Jacqueline Dunn was driven by Clarice Berryhill to the Bank of America in Whittier where June Banks had her account [R. T. 262-263].

Part of the general scheme required false identifications, the most prominent being California driver's licenses. It was near the end of March, 1967 that Jacqueline Dunn was present in the apartment of Leroy Ray in Los Angeles and saw some of the paraphernalia used in making false California driver's licenses. These included numerous licenses themselves along with a rubber date stamp [Gov. Ex. 24-B], ink pads [Gov. Ex. 24, 24-A], and a United States quarter that was used to imitate the seal of the State of California on the reverse of the California driver's licenses [Gov. Ex. 24-A; R. T. 249-252]. In fact, Leroy Ray had actually made up a false driver's license for Miss Dunn shortly before that occasion [R. T. 251].

On this particular mission at the Bank of America, Whittier, however, no false identification was used. Instead, Jacqueline Dunn arrived at the bank and after practicing a specimen signature, handed the teller, Kathleen Rosseen, a piece of paper with the name "June Banks" on it [R. T. 264-267]. Miss Dunn, in addition, identified herself as June Banks [R. T. 266]. Unfortunately for Jacqueline Dunn, another teller working at the bank at the same

time happened to be the real June Banks [R. T. 36-38]. She resided in Hollywood, was employed at the Bank of America in Whittier, and happened to be banking by mail. The Whittier police were immediately summoned and Jacqueline Dunn's attempted withdrawal was unsuccessful [R. T. 38, 267].

Another example of how the scheme operated is clearly seen in the following events in April, 1967. On the morning of April 4, 1967, a Mrs. Nathan Lipschultz placed two letters on her mail box for pickup by the mail carrier [R. T. 48-49]. Each letter was addressed to the Southern California Savings and Loan Association, 9250 Wilshire Boulevard, Beverly Hills. One letter bore her return address and contained her passbook to her savings and loan account at the institution [R. T. 49]. The other letter belonged to the sister of Mrs. Lipschultz, a Mrs. Inez Wilson [R. T. 49]. This other letter bore the return address of Mrs. Wilson and contained her passbook to the same institution [R. T. 49]. A short time after placing the letters on the mail box, Mrs. Lipschultz observed that they were not there and found that the mailman had not been to her address to effect delivery [R. T. 50].

Exactly six days later on April 10, 1967, the sum of \$10,000 was withdrawn from the account of Mrs. Lipschultz at the Southern California Savings and Loan Association [R. T. 52-55]. It was on April 12, 1967, only two days later, that an attempt was made to effect another \$10,000 withdrawal from the association, this time from the account of Mrs. Inez Wilson [R. T. 69-72]. On this date, Leroy Ray drove defendant Carroll Ellen Nutter to that

institution, at which time she attempted a fraudulent withdrawal [R. T. 80]. This time, however, she was unsuccessful and left the area in an Oldsmobile driven by Leroy Ray [R. T. 97], and registered to him [Gov. Ex. 9].

The original mailing envelope [Gov. Ex. 4], and the passbook [Gov. Ex. 4-A], of the Lipschultz account were recovered incident to the arrest of defendant Vincent Hill on April 28, 1967, at 4800 August Street, Apartment 4, Los Angeles [R. T. 397-399]. Fingerprints of defendant Hill were found on the Lipschultz passbook [Gov. Ex. 4-A]. In addition, a fictitious California driver's license in the name of Inez Wilson and bearing the photograph of Carroll Ellen Nutter were recovered incident to the arrest of Leroy Ray on April 28, 1967 [R. T. 436]. This is the very same fictitious license that Carroll Ellen Nutter had in her purse, but did not use when she attempted the fraudulent withdrawal [R. T. 582].

In addition to the two letters containing passbooks to the Southern California Savings and Loan, Mrs. Lipschultz also mailed a letter on April 4, 1967, to Dr. S. D. Daniels, containing her check No. 435, in the amount of \$94.00 [R. T. 53-54] [Gov. Ex. 5]. The original check content was recovered incident to the arrest of Vincent Hill on April 28, 1967 [R. T. 436], and two prints of defendant Hill were found on that check [R. T. 151].

An example of the use of banking information for use in forging a stolen check is found in the incident involving Mrs. Carl Cotterell. On the evening of April 13, 1967, Mrs. Cotterell observed her son mail checks with signatures and account number

at a collection box at Fourth Avenue and Country Club Drive in Los Angeles [R. T. 40-41].

One day later, April 14, 1967, Jacqueline Dunn was driven by Leroy Ray to the vicinity of Crocker Citizens National Bank, Pico-Bronson Branch, Los Angeles [R. T. 268-270]. Ray gave Jacqueline Dunn a check dated April 14, 1967, in the sum of \$289.50 [R. T. 267] [Gov. Ex. 3]. This was one of a series of checks that had been stolen in blank from the Neal Coffee Corporation, Los Angeles, on February 15, 1967 [R. T. 369-370]. This check bore the purported signature of Edith Cotterell [R. T. 41-42]. This was not her signature [R. T. 42], and Jacqueline Dunn was unsuccessful in attempting to cash this forged check at the Crocker Citizens Bank [R. T. 270-272].

Another instance of the use of stolen mail to provide names and signatures for stolen checks relates to the incident involving Mr. and Mrs. Walter Jespersen. On March 20, 1967, Mr. Jespersen mailed three letters in a collection box at Mansfield and Rosewood in Los Angeles [R. T. 133-136]. These were an envelope addressed to the Los Angeles Times [Gov. Ex. 13], containing his check No. 480, and an envelope addressed to Atlantic-Richfield Company, Los Angeles [Gov. Ex. 15], containing a check No. 481 [Gov. Ex. 14-A], and a statement of the amount due [Gov. Ex. 15-B], and an envelope to Allstate Credit Corporation [Gov. Ex. 16], containing a check No. 482 [Gov. Ex. 16-A], and a statement [Gov. Ex. 16-B].

All three rifled envelopes were recovered from a different

collection box located at Las Palmas and Willoughby on the morning of April 21, 1967 [R. T. 388-392, 445]. On the morning of April 29, 1967, check No. 480 [Gov. Ex. 14], which had been contained in the envelope addressed to the Los Angeles Times [Gov. Ex. 13], was recovered from the person of James Hollyfield incident to his arrest by the Los Angeles Police Department [R. T. 178].

Furthermore, James Hollyfield had on his person a check stolen in the burglary of the Fort Inn, Wilmington, California [R. T. 178] [Gov. Ex. 17]. On February 21, 1967, a substantial quantity of blank checks were stolen from the Fort Inn [R. T. 375-376]. The check that Hollyfield had on his person was now made out in the amount of \$279.14, dated April 25, 1967, and made payable to the person whose mail had been stolen on March 20th, namely, Mr. Walter Jespersen [Gov. Ex. 17]. Mr. Jespersen, of course, had no business connection with the Fort Inn and had no knowledge of the insertion of his name as payee on the stolen check.

It is to be noted that an expert witness from the Scientific Investigation Detail of the Los Angeles Police Department testified that he compared the check protector imprint on this stolen check that was in Hollyfield's possession [Gov. Ex. 17], with the check protector imprint on the other stolen check that bore the endorsement of Edith Cotterell [Gov. Ex. 3], that defendant Ray had given Jacqueline Dunn to cash at Crocker Citizens Bank on April 14, 1967 [R. T. 267]. It was his opinion that both imprints on the stolen checks were in all probability made by the same check protector [R. T. 477-478].



ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS

On August 29, 1967, Leroy Ray filed a motion to suppress all items seized incident to his arrest that occurred on April 28, 1967 [C. T. 16-20]. The Government filed an opposition on September 7, 1967 [C. T. 22-25], and on September 12, 1967, the court heard the motion and denied it without prejudice [C. T. 31].

The motion was again renewed on November 6, 1967, and was denied without prejudice [C. T. 56]. The following day, on November 7, 1967, Ray specified the items of evidence to which his motion to suppress was directed [C. T. 57].

The court then denied the motion to suppress, but reserved any final ruling until the Government attempted to offer the items into evidence [C. T. 57]. At this time, the court indicated to counsel that unless it were persuaded otherwise, it would grant the motion and exclude the evidence at the time of its attempted introduction [R. T. 209, lines 5 to 7].

On November 8, 1967, the Government requested the court for the first time to reconsider its intention to exclude the evidence, citing the decision of this Circuit in Ferganchick v. United States, 374 F.2d 559 (9 Cir. 1967) [R. T. 127-128]. It was the Government's contention that even if the complaint on which the arrest of Ray was based was defective, it was still proper for the court to look,



independent of the complaint, to determine if the arresting officer had the requisite probable cause [R. T. 127].

Later the same day, the court indicated it had studied the Ferganchick case and stated, " . . . this case appears to me to be squarely in point," [R. T. 211, lines 21 and 22] and " . . . I am going to have to reverse myself from my previous announcement and follow this case " [R. T. 209, lines 1 and 2]. The matter was, however, put over until Monday, November 13th, for further argument on the motion [R. T. 211, lines 6, 7].

On November 13th, the Government filed additional points and authorities along with an affidavit of Postal Inspector J. C. Peterson, the affiant in the original complaint and the arresting officer of Ray. On the same date, a hearing was held on the issue and the court ruled that the items found by Inspector Peterson incident to the arrest of Ray could be admitted at the trial [C. T. 60]. The items were subsequently marked for identification and admitted [R. T. 515].

Ray specifies as error that the motion to suppress should have been granted. The argument of Ray at pages 23 to 26 appears to cover two points: First, the right of the trial judge to reconsider a pretrial ruling [App. Br. p. 23], and second, the propriety of the final ruling.

Turning to the first point, appellant states that:

"The federal courts have generally held that the right to reconsider a ruling on a pre-trial motion is not unlimited. Where a second judge



sits in the same case he may not overrule the decision of another judge except in very exceptional circumstances." [App. Br. p. 23.]

Among the cases cited is United States v. Wheeler, 256 F. 2d 745 (3 Cir. 1950). In that case, the Circuit Court merely held that where an original judge had denied a motion to suppress evidence and had assigned the petition for rehearing on the motion to another judge, it was an abuse of discretion for the second judge to take testimony which was substantially of the same content as that at the original motion to suppress.

Appellant then stated that, "Even where the same judge sits in the case this rule has been applied," citing Douse v. United States, 359 F.2d 1014 (D. C. Cir. 1966) [App. Br. 23].

The decision in Douse, however, is hardly authority for that proposition, for there, too, as in Wheeler, two judges were involved. Douse v. United States concerned a charge of violation of the narcotics laws in which one judge at a suppression hearing had denied a motion to suppress. Later at trial, with a different judge presiding, the testimony of an arresting officer appeared to differ from that at the motion to suppress. The defendant asked the court to reconsider the decision on the motion to suppress and requested permission to interrogate the officer in a hearing outside the presence of the jury. The trial judge denied the motion to reconsider, solely on the ground that the suppression judge had held a full and complete hearing. The Circuit Court merely held

that it was error for the trial judge not to reconsider the ruling on the motion in the light of the change of the arresting officer's testimony at trial, and remanded it to the trial court for a fresh determination of the suppression issue.

With the above mentioned cases as apparent authority, the appellant then argues that:

"These cases develop an exception to the doctrine of finality when the defendant renews his objections at trial. There is no authority that the converse is also true. [App. Br. 23.]

Appellant thus appears to advance the very novel theory that a decision granting a motion to suppress made at a hearing prior to trial cannot be altered at trial, and that only if the motion is denied, and the defendant later renews his objection at trial, can the trial judge reverse himself. In fact, the appellant himself states:

" . . . the court could not reverse its decision without additional evidence having been offered or exceptional circumstances occurring. "
[App. Br. 24.]

In response to this novel contention, it may be noted that nowhere does the record reflect that a final ruling granting the motion to suppress was ever made by the trial judge. To the contrary, the court merely indicated its strong intention to exclude

the evidence at the time of its introduction at trial on the basis that the complaint on which the arrest warrant was based was defective [R. T. 209, lines 5 to 7].

But even if a ruling had been made prior to trial, granting the motion to suppress, it would appear to be not only a novel but an absurd contention that a trial judge could not request additional authority on an issue, hear additional evidence, and then make a final ruling during trial to admit the evidence. That is precisely what was done in the instant case and hardly qualifies as error on the part of the trial judge.

Assuming, therefore, that it was proper to have considered the question of admissibility of the evidence again at the time of trial, it is necessary to examine at this point the factual issues and the law applicable to those facts.

On April 19, 1967, Postal Inspector J. C. Peterson obtained a complaint against Leroy Ray, charging that he, on April 12, 1967:

" . . . unlawfully had in his possession the contents of a letter which had been stolen from an authorized depository for mail matter. The letter addressed to So. California Savings and Loan Association, 9250 Wilshire Blvd., Beverly Hills, California, and at said time and place the defendant well knew said contents of said letter to have been stolen."

[App. Br., Ex. A.]

This was later the basis for overt act No. 3 in Count One of the Indictment [C. T. 2].

The probable cause in the complaint was written as follows:

"The subject letter was placed out for carrier pickup and not received by the addressee. The contents of said letter was used in an attempt to withdraw funds from mailer's account at addressee firm. The subject and his car have been identified as the means of escape for the person attempting the withdrawal." [App. Br. , Ex. A.]

It is conceded that based on the decision in Giordenello v. United States, 357 U.S. 480 (1957), the instant complaint was defective in that it failed to state from which sources the Postal Inspector had obtained the information.

But the law is clear that an arrest made under the authority of defective warrant may be justified by establishing the existence of probable cause for the arrest independent of the warrant.

Go-Bart v. United States, 282 U.S. 344 (1930);
United States v. Hall, 348 F.2d 837, 841-842
(2 Cir. 1965), cert. denied 382 U.S. 997
(1965);
Bell v. United States, 371 F.2d 35 (9 Cir. 1967);
Ferganchick v. United States, 374 F.2d 559
(9 Cir. 1967).

In fact, this Honorable Court in Bell v. United States, supra, following and referring to United States v. Hall, supra, stated:

"In that case there was a warrant which the Government conceded to be invalid. It argued, as it does in this case, that the arrest was nevertheless lawful because of the existence of the required reasonable grounds to believe that the arrested person had committed the crime. The defendant there urged that the fact that a warrant, though an invalid one, had been obtained conclusively demonstrated that there was sufficient time to obtain a warrant and, that being so, the arrest without a warrant was illegal.

"The court in Hall declined to 'impose on the law of arrest a requirement thus far confined to the law of search and seizure.' Judge Friendly's opinion in Hall, at pages 841-842, cites and quotes from the pertinent judicial precedents and other writings and concludes that the arrest was lawful and that the admissions made by the defendant shortly after the arrest were admissible in evidence. We agree with the Hall decision and opinion and will not further discuss it here. "

Bell v. United States, supra, p. 37.

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In the instant case, that is precisely the procedure that was employed. Inspector Peterson swore an affidavit that was considered by the court, in which he outlined the information he had prior to the arrest of Ray, and from which sources he had obtained it.

Inspector Peterson stated that he received the following information prior to the arrest of the appellant: That on April 4, 1967, Mrs. Nathan Lipschultz had placed two letters on her mail box for carrier pickup, both letters addressed to Southern California Savings and Loan Association, 9250 Wilshire Boulevard, Beverly Hills, California; that one letter bore her return address and contained her own passbook to her savings and loan account at that institution, and that the other letter bore the return address of her sister, Inez Wilson, and contained Mrs. Wilson's passbook to the same institution; that both these letters were never received by the addressee; that on April 10, 1967, an unauthorized \$10,000 withdrawal was effected from the Lipschultz account at the savings institution by an unidentified individual; that on April 12, 1967, a female Caucasian made an attempted \$10,000 withdrawal from the Inez Wilson account at the same institution, and that the teller, Barbara Fleer, had positively identified the individual attempting the fraudulent withdrawal as being Carroll Ellen Nutter; that this individual was known to Inspector Peterson as being involved in the conspiracy of mail thieves; that a parking attendant across the street from the savings institution, James Simmons, had positively identified the individual driving the getaway car as being Leroy Herbert Ray; that Ray was known to Inspector Peterson as an

individual who had furnished false identification on previous fraudulent withdrawals from banks; that another eye-witness, Vester Stevenson, had observed the license number of the automobile as being TPK 518; that Inspector Peterson received from the Department of Motor Vehicles the information that the license number of TPK 518 was registered to an automobile owned by Leroy Ray [C. T. 64-66].

The trial court, considering the testimony of Inspector Peterson, ruled finally that probable cause independent from the complaint existed for the arrest of appellant, and that the items seized could be admitted at trial [C. T. 60].

Probable cause exists if the facts and circumstances known to the officer would cause a reasonable, cautious and prudent man having the specialized knowledge of an enforcement officer to believe that a felony had been committed.

Carroll v. United States, 267 U.S. 132 (1925);
Brinegar v. United States, 338 U.S. 160 (1949);
Draper v. United States, 358 U.S. 307 (1959);
Henry v. United States, 361 U.S. 98 (1959);
Burk v. United States, 287 F.2d 117 (9 Cir. 1961),
cert. denied 369 U.S. 841 (1961).

The trial court was clearly correct in its ruling that probable cause existed for the arrest of appellant Ray.



II

THE EVIDENCE SECURED IN CONNECTION WITH DEFENDANT HOLLYFIELD'S ARREST WAS VALIDLY SEIZED

Appellant argues that the evidence secured in connection with the arrest of co-defendant Hollyfield was inadmissible and should have been suppressed.

Appellant's contention in this regard is somewhat confusing due to a substantial variance between his second specification of error and the argument thereunder. The specification in his "Subject Index" states that there was error in not granting Hollyfield's motion to suppress evidence and that appellant was prejudiced by the use of this evidence. However, the argument under this specification deals exclusively with the issue of the "Standing of appellant to raise the issues" [Appellant's Brief p. 11-14]. There is no discussion therein regarding the validity of the seizure of the evidence in question.

Turning first to the issue of standing, it is clear that Ray only comes within the class of those "who claim prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else. Jones v. United States, 362 U.S. 257, 261 (1960).

The search to which Ray now refers was directly solely at Hollyfield; no evidence whatsoever was taken from Ray himself. Appellant Ray therefore lacks standing to challenge the search and seizure relative to Hollyfield. Diaz-Rosendo v. United States,



357 F.2d 124 (1966), cert. denied 385 U.S. 856 (1966).

But even assuming that Ray has standing, the search and seizure relative to Hollyfield was valid. An examination of the record clearly reflects that no unlawful procedures whatsoever were employed by the arresting officers. The police officers' entry into Hollyfield's apartment was valid and consented to. Both arresting officers testified that they went to the Hollyfield residence in answer to complaints of noise from this apartment. They knocked on his door, Hollyfield opened it and, knowing why the police were there, "he told us to come in" [R. T. 177-78, 192-94, 228.] Thus, the facts present a situation where officers are invited onto the premises, having no intent to arrest Hollyfield or search the area. See Thompson v. United States, 382 F.2d 390, 393 (9 Cir. 1967); United States v. Barone, 330 F.2d 543 (2 Cir.), cert. denied 377 U.S. 1004 (1964); Davis v. United States, 327 F.2d 301, 303 (9 Cir. 1964). The officers, as Hollyfield was aware, were responding to a complaint of noise and thus entered as part of their normal duties.

Whether the sworn testimony of the officers -- that their entry was consented to, under no circumstances of coercion, stealth, or duress -- is to be believed was a question of fact for the trial court. Redmon v. United States, 355 F.2d 407, 411 (9 Cir. 1966); Davis v. United States, supra, at 304-05; United States v. Page, 302 F.2d 81, 82-85 (9 Cir. 1962) (en banc). The determination of this fact is thus binding, unless so obviously mistaken as to be "clearly erroneous". United States v. Page,



supra, at 85. See also Nelson v. People, 346 F.2d 73, 77 (9 Cir. 1965).

Once inside Hollyfield's apartment, it is clear that no "search" was conducted. There can hardly be doubt that once legally inside the premises, what police officers see in plain view is not to be deemed a discovery due to a "search". Ker v. California, 374 U.S. 23, 43 (1962) (brick of marihuana seen on scale in kitchen; no search); Davis v. United States, supra, (wastebasket containing marihuana seen within five feet of door; no search). See also United States v. Lefkowitz, 285 U.S. 452, 465 (1932); United States v. Lee, 274 U.S. 559 (1927); United States v. Barone, supra; People v. West, 144 Cal.App.2d 214, 300 P.2d 729 (1956).

And such rationale is not restricted to the immediate view of the officers at the doorway. Ker v. California, supra (evidence in kitchen through another doorway); United States v. Barone, supra (counterfeit bills floating in toilet in adjoining bathroom; no search); Davis v. United States, supra (marihuana found in waste basket in adjoining bathroom).

In the present case, the officers smelled the odor of what they determined to be marihuana upon entering the premises [R. T. 180, 198, 229-30]. Without moving, they saw the tell-tale "zig-zag" paper used to roll marihuana cigarettes [R. T. 182]. Unusually colored cigarette butts, characteristic of marihuana, were in an ashtray plainly visible in an adjoining room [R. T. 181-182]. One officer, taking only a few steps, picked up and examined



one of these butts, and determined it to be marihuana [R. T. 183]. Thus, applying the relevant case law, it is evident that the officers conducted no search prior to the arrest, yet "were not required to remain blind to the obvious". Davis, supra, at 305.

Furthermore, it is clear from the record that probable cause existed for the arrest of Hollyfield for narcotics violations. The arrest in this case was effected by Los Angeles police officers for violation of a California statute. The states may work out their own rules governing arrests, provided that these rules stay within the Fourth Amendment and within the rule that illegally seized evidence is inadmissible at trial. Beck v. Ohio, 379 U.S. 89, 92 (1964); Ker v. California, 374 U.S. 23, 37 (1963); United States v. DiRe, 332 U.S. 581, 589 (1948). The validity of this arrest is therefore to be determined by state law, within the bounds of the United States Constitution. Ker, supra, at 37; Wartson v. United States, ___ F.2d ___ (9 Cir.), No. 21,830, August 21, 1968, Slip Op. at 4; Dagampat v. United States, 352 F.2d 245 (9 Cir.), cert. denied 383 U.S. 950 (1965); Lipton v. United States, 348 F.2d 591, 594 (9 Cir. 1965); Burk v. United States, 287 F.2d 117.

California Penal Code, §836, provides that:

"A peace officer may make an arrest in obedience to a warrant, or may, without a warrant, arrest a person:

"1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.

"2. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed. "

The test of reasonable cause for arrest has been stated to be whether there is:

"more evidence for than against, so that a man of ordinary care and prudence, knowing what the arresting officer knows, would be led to believe or conscientiously entertain a strong suspicion of the accused's guilt, although reserving some possibility for doubt. "

People v. Murietta, 60 Cal. Rptr. 56, 57,
251 A. C. A. 1147, 1148 (1967).

See also People v. Dabney, 59 Cal. Rptr. 243,
250 A. C. A. 1078 (1967).

As stated by the United States Supreme Court:

"[P]robable cause [exists] . . . 'where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. '"

Ker v. California, supra, at 35, quoting Brinegar

v. United States, 338 U.S. 160, 175-176
(1949);

Carroll v. United States, 267 U.S. 132, 162 (1925).

In the instant case, the facts relied upon for justifying the arrest were the odor of recently burnt marihuana, and the paper used and examination of the butts from such cigarettes.

The Supreme Court of the United States has noted that,

" . . . We cannot sustain defendant's contention that odors [of narcotics] . . . cannot be evidence sufficient to constitute probable grounds for any search. "

Johnson v. United States, supra, at 13;

and,

"A qualified officer's detection of the smell of mash has often been held a very strong factor in determining that probable cause exists . . . "

United States v. Ventresca, 380 U.S. 102, 111
(1965);

see also Rugendorf v. United States, 376 U.S. 528
(1964).

In the present case, the officers testified to training and long experience in marihuana detection [R. T. 181]. The case law supports the contention that the factual situation, viewed from the vantage of such experienced law enforcement officers, provided probable cause for arrest.

In People v. Lee, 260 A.C.A. 885 (1968), the police stopped a car for absence of a license plate. An officer leaned over to question the driver and detected what he determined to be marihuana smoke. Ordering defendant out of the car, he noted that defendant's pupils were dilated and his speech was slurred. These facts alone sufficed for probable cause for arrest for marihuana violations and justified search incident to arrest.

Similarly, in other cases, the odor of burning marihuana and the suspect's physical appearance, judged in light of the officers' training and experience, have consistently been held to meet the probable cause standard for arrest. People v. Layne, 235 Cal. App. 2d 188, 193, 45 Cal. Rptr. 110 (1965); People v. Jefferson, 230 Cal. App. 2d 151, 40 Cal. Rptr. 715 (1965); People v. Clifton, 169 Cal. App. 2d 617, 337 P. 2d 871 (1959).

In People v. Bock Leong Chew, 142 Cal. App. 2d 400, 298 P. 2d 118 (1956), police, in the building on another matter, detected what they thought to be opium when they were passing outside defendant's apartment. Defendant's wife admitted them. The subsequent search, which turned up opium, was deemed valid. See also People v. Chong Wing Louie, 149 Cal. App. 2d 167, 307 P. 2d 929 (1957).

The odor of burning marihuana emanating from parked cars and furtive motions of the occupants when approached, seen in light of police training and experience, have consistently been found to constitute probable cause for arrest, and subsequent search incident thereto. See, e. g., People v. Sullivan,

242 Cal. App. 2d 767, 51 Cal. Rptr. 778 (1966); People v. Langley, 182 Cal. App. 2d 89, 5 Cal. Rptr. 826 (1960); People v. Tisby, 180 Cal. App. 2d 574, 5 Cal. Rptr. 615 (1960).

In People v. Sandoval, 419 P. 2d 187, 54 Cal. Rptr. 123 (1966) (en banc), cert. denied 386 U.S. 948 (1967), the police had just arrested a woman with heroin in her possession leaving defendant's house. They knocked on the door; when the door was opened they detected a plastic bag lying in plain view on the floor inside. Their determination from outside the door that this bag contained narcotics was deemed sufficient probable cause for arrest and search of the occupants.

It is submitted that the evidence in plain view to the officers who were legally on the premises, justified their belief that since a felony had been committed and was being committed in their presence, probable cause existed to arrest the defendant, James Hollyfield.

Since the arrest was valid, the search of Hollyfield's person, incident to the arrest, was also valid even though it turned up evidence of a crime unrelated to the one prompting the arrest.

United States v. Rabinowitz, 339 U.S. 56 (1950);

Cotton v. United States, 371 F.2d 385, 393-94
(9 Cir. 1967);

Taglavore v. United States, 291 F.2d 262, 265
(9 Cir. 1961);

Charles v. United States, 278 F.2d 386, 389
(9 Cir. 1960).

See also: Davis v. United States, supra;

United States v. Barone, supra.

III

A HEARING WAS CONDUCTED OUTSIDE THE PRESENCE OF THE JURY REGARDING DEFENDANT HOLLYFIELD'S MOTION TO SUPPRESS EVIDENCE, AND NO ERROR WAS COMMITTED BY NOT CONDUCTING A SECOND HEARING

Leroy Ray specifies error as follows:

"The court below erred [sic] in not holding a hearing outside the presence of the jury relative to the validity of the seized evidence from Hollyfield in violation of Article VI of U.S. Constitution."

[Appellant's Subject Index.]

This claim has no validity for the following reasons:

(1) such a hearing was in fact held; (2) no appropriate motion was made during trial requiring a second hearing; and (3) the evidence complained of was not prejudicial to the interests of appellant Ray.

Turning first to the fact that a hearing was in reality held. On October 26, 1967, counsel for Hollyfield filed a "Notice of Motion and Motion to Dismiss Indictment or in the Alternative to Suppress the Evidence", and a supporting petition and points and

authorities [C. T. 37-43]. On November 6, 1967, a pretrial hearing was held with no jury present, and the court denied Hollyfield's motion to suppress the evidence or dismiss the indictment [C. T. 56]. Part of the evidence considered at this hearing consisted of a description by the arresting officer of the marihuana found in Hollyfield's apartment. This is shown by the affidavit of R. E. Stanton attached as part of appellee's "Opposition to Motion to Suppress" [C. T. 50-52].

Ray cites McNabb v. United States, 318 U. S. 332 (1943) as his sole support for his claim that "[i]t iw [sic] well settled that where a question as to the admissibility of evidence allegedly illegally obtained in property [sic] raised, the court must conduct a hearing outside of the presence of the jury." [App. Br. p. 14.]

This is an erroneous conclusion. As stated by the court in McNabb:

"To determine the admissibility of the statements secured from the defendants . . . the trial court conducted a preliminary examination in the absence of the jury. After hearing the evidence . . . the court concluded that the statements were admissible." Footnote 5a, 338-9.

In actuality, the holding in McNabb was that the statements should have been ruled inadmissible and that it was prejudicial error to admit them into evidence. The court in McNabb was not concerned with the mechanics of the hearing. In the instant case, just as in

McNabb, a hearing was held outside the presence of the jury to determine the admissibility of evidence which the defendants sought to suppress.

It is fundamental, in considering this issue, to keep in mind that Ray does not challenge the admissibility of the evidence per se. Rather, Ray only questions the mechanics by which the evidence was admitted.

Turning next to the next issue, Ray is in error when he states, "the court refused to conduct a hearing outside the presence of the jury." [App. Br. p. 14.] A review of the reporter's transcript, pages 177-178, fails to reflect any request whatsoever by any defense counsel that the court hold a hearing outside the presence of the jury. Counsel for Hollyfield objected to the testimony offered and moved to strike same, and also inquired, "[d]oes your Honor want this matter before the jury or should this go on in their absence?" [R. T. 177]. The court responded, "[i]t is all right just as it is," [R. T. 177], and defense counsel offered no further objection, exception or motion. Counsel did inquire into the court's opinion regarding the propriety of the testimony before the jury, but counsel did not indicate that he wanted a second hearing outside the presence of the jury.

Even assuming that the second hearing should have been held, Ray was not prejudiced by this omission. Ray claims that failure to hold this hearing " . . . placed in front of the jury extremely damaging testimony of the defendant's [Hollyfield's] alleged position [sic] of marijuana . . . " [App. Br. p. 14].

This claim is without merit for two reasons. First, the testimonial evidence in question was admissible in any event because it dealt directly with the circumstances surrounding the arrest of Hollyfield and the obtaining of items of stolen mail found on his person. Ray's citation of Thurman v. United States, 316 F.2d 205 (9 Cir. 1963) is not persuasive because it dealt with the inadmissibility of leading questions concerning purported unrelated criminal acts not resulting in convictions. By contrast, the evidence questioned by Ray is directly related to the acquisition of evidence essential to the case at bar, and was therefore clearly admissible.

The second reason that Ray suffered no prejudice is that the marihuana evidence bore absolutely no relationship to him, even assuming, for the sake of argument, that this should not have been admitted. This evidence only concerned Hollyfield. A review of the testimony concerning the marihuana references fails to yield any indication that Ray was in any way involved [R. T. 177-186].

In fact, to insure that Ray was not associated with the marihuana by the jury, the trial judge made the following very explicit statement to the jury following the above cited testimony:

" . . . certainly the jury knows that we are not trying the defendants here for any violation or any defendant for any violation of the marijuana or narcotics laws, we are not trying them for being bad men, we are trying them for specific violations which are charged in the indictment and it will be limited to that. " [R. T. 186.]

THE COURT PROPERLY INSTRUCTED THE
JURY WITH REGARD TO APPELLANT'S
FAILURE TO TESTIFY

Ray specifies as error the instruction given the jury

regarding his failure to take the stand [App. Br. Subject Index].

The instruction given by the trial judge is as follows:

"The law does not compel a defendant to take the witness stand and testify. In this case the defendant Ray has not done so. No presumption of guilt may be raised, and no inference of any kind may be drawn from the failure of a defendant to testify." [R. T. 737]

In terms of content, this has been upheld as a proper instruction. Coleman v. United States, 367 F.2d 389 (9 Cir. 1966).

After a very brief mention of Griffin v. California, 380 U.S. 609 (1965), Ray further cites Bruno v. United States, 308 U.S. 287 (1939), for the proposition:

" . . . that it was reversible error not to give a requested instruction that no presumption should be drawn from the fact that the defendant had not taken the stand to testify in his own behalf. "

[App. Br. p. 26]

The Bruno case is hardly in point in the fact situation of the instant case, which involves not the refusal to instruct as in

Bruno, but the giving of an instruction to which Ray now takes exception.

Ray argues that:

"In the case before this court it was the request of the appellant RAY that no instruction be given whatsoever relative to his failure to take the stand to testify. (6 TR 768 - 769)." [App. Br. p. 26]

The record of trial, however, does not sustain this contention. Prior to the giving of instructions the court informed all defendants of what instructions were to be given [R. T. 117-119; 590]. The appellant made no objection whatsoever at this time. It was only later, after the instruction had been given, that an objection was made [R. T. 768].

But even assuming that the objection was timely, the law is clear that the instruction was properly given. Appellant in effect concedes this point, in citing Belcher v. United States, 5 F.2d 45 (2 Cir. 1944). More recently the Circuit Court for the District of Columbia held specifically that it was not error to give such an instruction even if the defendant requests that it be withheld. Lyons v. United States, 284 F.2d 237 (D. C. Cir. 1960).

It is, therefore, clear that the instruction was proper in terms of content, and was correctly given to the jury in the instant case.

THE QUESTIONS AND COMMENTS BY THE
TRIAL JUDGE WERE PROPER AND WITHIN
HIS SOUND DISCRETION

The court in Fletcher v. United States, 313 F.2d 137

(9 Cir. 1963), cert. denied 374 U.S. 812 (1963), at p. 139

concluded that: "It is within the province of a federal trial judge to interrogate witnesses and also to comment on their testimony if he so desires." The court also set forth the basic proposition that "(a) federal trial judge . . . is more than a moderator or umpire. He has the responsibility to preside in such a way as to promote a fair and expeditious development of the facts unencumbered by irrelevancies." See also United States v. Wade, 364 F.2d 231 (6 Cir. 1966). The record of trial in the instant case clearly reflects that the trial judge acted well within the range of his discretion in his questions and limited comments.

Appellant supports his general claim of error by reference to Bollenbach v. United States, 326 U.S. 607 (1947), and Wilson v. United States, 250 F.2d 157 (2 Cir. 1957). An examination of the cases reveals no real relevance to the instant case. In Bollenbach, supra, prejudicial error took the form of an incorrect instruction. The court stated, inter alia, at page 613, that the trial judge "was not even 'cursorily' accurate. He was simply wrong." In Wilson, supra, the reversal was due to the application of an erroneous standard of law by the trial judge. In Ah Kee Eng, supra, the court set forth three reversible errors, one of which was based upon the

serious prejudicial nature of the trial judge's treatment of defense counsel throughout the trial. As discussed below, the trial judge in the case at bar in no way could be said to have mistreated counsel for appellant.

Regarding questions, the trial judge clearly has the right to question witnesses. As stated in Baker v. United States, 357 F.2d 11, 14 (5 Cir. 1966): "The function of the trial judge in aid of truth and in furtherance of justice to question witnesses . . . is well recognized in the jurisprudence of this country." It is indeed true that the trial judge must be careful to maintain an attitude of impartiality and to guard against giving the jury the impression that he believes in the guilt of the defendant. United States v. Hill, 357 F.2d 11 (5 Cir. 1966). None of the questioning by the trial judge, however, could be said to have violated these cautions.

A review of the testimony of witness Dunn as reproduced in the reporter's transcript, pages 268 through 279, fails to lend any support to appellant's claim that the trial judge's questions were "leading and suggestive." [App. Br. p. 17]. The trial judge pointed out that this witness was "obviously under some emotional strain . . .", and showed "reticence" and "reluctance" while being questioned (R. T. 282). Under such circumstances, it is not at all improper for the trial judge to question the witness.

The decision in Ward v. United States, 353 F.2d 156, 157 (5 Cir. 1965) is directly in point. There the court stated:

"The first witness for the Government . . . appeared to be reluctant and somewhat vague in his

answers. The trial judge interrogated this witness for the rather obvious purpose of avoiding undue delay and to clarify the testimony. We are unable to conclude that any unfavorable impression was conveyed to the jury"

For the same reasons, appellee contends that the trial judge acted properly in his questions and rulings during the testimony of witness Dunn as set forth in the reporter's transcript, pages 242-321. Nothing contained therein lends support for appellant's conclusion that the judge conveyed an impression of confidence in her testimony to the jury [App. Br. p. 15].

Finally, appellant is concerned with the question "(d)id he say anything about the method to be used for" asked witness Dunn by the trial judge (R. T. 246). The judge agreed that this was leading and, prior to any response by the witness, he withdrew the question and asked instead, "(w)as there anything said about the use of these numbers, account numbers?" [R. T. 246]. Certainly the trial judge acted correctly in withdrawing and rephrasing the original question, and no error was committed.

During the cross examination of witness Dunn by counsel for appellant the trial judge asked the witness to clarify the meaning which she attached to the term "discussed" [R. T. 291]. Appellant claims that this questioning indicates "an apparent willingness by the court to preclude the rigorous, exacting and searching nature of cross-examination" [App. Br. at 19].



The vacuity of this claim is readily apparent from a review of the exacting cross-examination actually conducted by counsel for appellant with regard to the same "discussion" [R. T. 291-295].

Regarding comments of the trial judge, it is within the discretion of the trial judge to comment fairly on the evidence. Fletcher v. United States, *supra*, United States v. England, 347 F.2d 425 (7 Cir. 1965). As discussed below, the comments questioned by appellant were not improper. The instant case is far removed from United States v. Porter, 386 F.2d 270 (6 Cir. 1967) which was cited by appellant. In that case, the trial judge practically gave a closing argument to the jury, and also made extensive comments during the trial.

The trial judge is free to comment that the trial is "a search for the truth" [R. T. 246]. Appellant sees this as an admonishment [App. Br. p. 16]. Even if it is so categorized, such comments are clearly allowable under Paddock v. United States, 327 F.2d 971 (9 Cir. 1963). See also Johnson v. United States, 356 F.2d 680 (8 Cir. 1966). These authorities also support the propriety of the trial judge's comment that "the law permits the barest interrogatories as to whether or not a person has ever been convicted of a felony, but it also throws somewhat of a cloak around the witness and prevents them (sic) from public shame and disgrace." [R. T. 296]. According to the appellant "(i)t seems fair to say that the trial judge's reproach of counsel told each juror that appellant's lawyer was not only acting outside legal limits, but was trying to hold witness Dunn up to 'public shame and disgrace.' " [App. Br. p. 20].

It is obvious that the comment in question was well within the discretion of the trial judge in addition to being a correct paraphrasing of applicable legal principles.

Turning to another area, after several pauses of indeterminate length in her responses to questions posed by counsel for appellant, the witness Dunn was instructed by the trial judge to answer "in substance" and that "very few people remember exactly and precisely what they say." [R. T. 300]. This followed the question "(n)ow what I want to know is what did you say to Mr. Peterson?" [R. T. 300]. The fact that this witness did have recall problems is indicated by her later answer "(n)o, I am just trying to think back. So many things have happened. I can't remember everything." [R. T. 327]. Actually, it appears that the trial judge was attempting to aid counsel for appellant in obtaining answers. Certainly this would hardly constitute prejudicial error. See United States v. Birmbaum, 373 F.2d 250 (2 Cir. 1967).

Regarding the statement of the judge relative to the existence of a conspiracy, on Tuesday, November 14, 1967, the fourth day of trial, codefendant Deborah Sandra Karish testified on behalf of the Government. Shortly after beginning, the following took place between counsel for Hollyfield and the Court:

"MR. MILLER: . . . Your Honor, I would like an instruction at this time on behalf of the defendant Hollyfield, I made it prior to the other witnesses, this woman testified she only recognized one defendant, any admissions, confessions or

extrajudicial context which attempts to reflect prejudicially to Mr. Hill is not to be prejudicial to my client Mr. Hollyfield. I would like the jury to be so instructed, that that testimony should not be applicable to Mr. Hill.

"THE COURT: No, I won't do that. I think there is sufficient in the record at this time for a reasonable person to conclude that there was a conspiracy, and after there is a conspiracy at the appropriate time the jury will be instructed at length about the applicability of statements of one co-conspirator against another." [R. T. 349-350]

First, appellant is precluded from raising this issue on appeal because no objection was offered at trial with regard to this comment. As stated in Gilbert v. United States, 307 F.2d 322 (9 Cir. 1962), cert. denied 372 U.S. 969, at 325: "Failure to make objection to evidence either before or at trial precludes consideration of objections thereto on appeal unless good cause for such failure is shown." Appellant's failure to preserve the record is not excused by his citation of Bursten v. United States, 395 F.2d 976 (5 Cir. 1968) because in that case the trial judge clearly abused his discretion and deprived the defendant of a fair trial. The court cited the following examples of prejudicial comments at page 983: " 'If he doesn't prove it, I hope the jury will hold it against him . . . ' 'Yes, Mr. Booth, now get back to your case, if

you have a case.' " Comments of this nature are clearly distinguishable from those offered by the trial judge in the case at bar. It is quite apparent that the trial judge was not stating that there was, in his estimation, any guilt on the part of this defendant. Rather, this was a routine ruling on the admissibility of evidence. Further, the comment was in response to a request of defense counsel.

Second, in the event this issue is properly on appeal, this comment was well within the wide scope of discretion allowed federal trial judges. Fletcher v. United States, supra and e. g. , Thurmond v. United States, 361 F.2d 537 (D. C. Cir. 1966), Franano v. United States, 310 F.2d 533 (8 Cir. 1962), cert. denied 373 U. S. 940 (1962).

Finally, any doubt the jury might have had regarding this comment was completely erased by the extensive instructions given to the jury regarding the nature of conspiracy and the role of the jury as sole judge of the facts. In this regard, the following instructions were given:

"In determining whether or not a defendant, or any other person, was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by the evidence in the case as to his own conduct, what he himself wilfully said or did.

"Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then the statements there after knowingly made and the acts there after knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member. . . .

"In your consideration of the evidence in the case as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed, as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not the accused willfully became a member of the conspiracy.

"If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was willfully formed, and that the accused willfully became a member of the conspiracy either at the inception or beginning of the plan or scheme, or afterwards, and that thereafter one or more of the conspirators knowingly committed, in furtherance of some object or purpose of the conspiracy, one or more of the overt acts charged, then the success or failure of the conspiracy to accomplish the common object or purpose is

immaterial." [R. T. 752, 753]

* * * * *

"The law of the United States permits the Judge to comment to the jury on the evidence in the case. Such comments are only expressions of the Judge's opinion as to the facts, and the jury may disregard them entirely, since you as jurors are the sole judges of the facts in this case." [R. T. 762]

* * * * *

". . . Remember at all times that you, as jurors, are at liberty to disregard all comments of the court in arriving at your own findings as to the facts." [R. T. 764]

Counsel for appellant not only failed to object to any of these instructions, but in addition, he failed to offer any additional instructions of his own. By this dual inaction counsel for appellant tacitly admitted that the instructions as given were sufficient. Appellant cannot make his initial challenge of the instructions in his appeal. White v. United States, 394 F. 2d 49 (9 Cir. 1968), Pratti v. United States, 389 F. 2d 660 (9 Cir. 1968).

THE TRIAL JUDGE APPROPRIATELY DEFINED
THE BOUNDARIES OF CROSS-EXAMINATION
DURING THE TESTIMONY OF JACQUELINE
ROCHELLE DUNN

Ray questions the validity of several of the trial judge's rulings made during counsel for appellant's cross-examination of Jacqueline Rochelle Dunn [App. Br. 7-11]. A review of the record of trial clearly reflects, however, that each of these rulings was well within the trial judge's broad discretionary power to control the scope of cross-examination.

There can be no doubt that the trial judge is invested with extensive discretionary powers regarding the scope of cross-examination. Generally speaking, ". . . the conduct of a criminal trial is a matter within the discretion of the court . . . and such discretion will not be disturbed in the absence of a clear showing of abuse." [citing cases], United States v. Wade, 364 F.2d 931, 936 (6 Cir. 1966). Dealing specifically with the content of cross-examination, the court in Hendrix v. United States, 327 F.2d 971, 976 (5 Cir. 1964), sets forth the traditional rule that ". . . the scope of cross-examination is left largely in the discretion of the trial court. In the absence of an abuse of discretion, the trial court's ruling will be upheld. . . ." [citing cases]

Ray cites Dixon v. United States, 333 F.2d 348 (5 Cir. 1964), for the proposition that the trial judge cannot begin to exercise his discretion over the scope of cross-examination until after a party

has an opportunity to cross-examine [App.Br. 8]. This may be a valid proposition, but it is important to point out that in Dixon, unlike the instant case, defense counsel was not allowed to proceed with any cross-examination whatsoever following the direct examination of a witness. Dixon has little relevance to the instant case wherein counsel for appellant subjected witness Dunn to a lengthy and detailed cross-examination [R. T. 289-316].

Ray asserts that the trial court unduly restricted cross-examination of witness Dunn concerning her possible interest in testifying. First, Ray is foreclosed from pursuing this inquiry because he failed to bring the alleged error to the attention of the trial court. As set forth in three decisions of this Court, Gilbert v. United States, 307 F.2d 322, 326 (9 Cir. 1962), cert. denied 372 U.S. 969 (1962), Hill v. United States, 261 F.2d 483, 489 (9 Cir. 1958), and White v. United States, 394 F.2d 49, (9 Cir. 1968), an alleged error must be brought to the attention of the trial court as a prerequisite to Appellate review.

When counsel for appellant asked witness Dunn: "You don't expect to gain any favor or reward by virtue of what you said in your direct examination about Mr. Ray, do you?", the court ruled that the question had previously been asked and answered in the negative [R. T. 308]. After an explanation of this ruling, counsel for appellant in no way indicated to the trial court that he thought that the ruling was in error [See R. T. 309].

Second, even if this issue is properly before the appellate court, inquiry into witness Dunn's interest in testifying was

certainly not unduly restricted. The only ruling questioned by Ray in this regard is that set forth above concerning the question which was "asked and answered" [R. T. 308]. Clearly this was not a restrictive ruling, since both the question and answer became part of the trial record, available to the jury for its consideration.

This ruling in no way foreclosed counsel for appellant from pursuing this issue further through the use of other questions and avenues of approach not previously utilized. In fact, appellant's counsel did indeed pursue this issue by questioning the witness in considerable detail about conversations held with Government personnel prior to the trial in this case [R. T. 291-311; 321-335].

Even if it could be said that the trial court did in fact limit inquiry into witness Dunn's interest in testifying, such limitation was clearly not an abuse of discretion. This is so because the jury was very adequately appraised of the factors which might have influenced witness Dunn's interest in testifying. For example, the jury was made aware of the facts that witness Dunn was listed as a co-defendant in the indictment concerning this case [R. T. 234-235], and that action against this witness was still pending [R. T. 235].

The jury was informed of the fact that the witness might be testifying to aid herself when she was asked, "Miss Dunn, are you expecting to gain some favor by coming here testifying --," [R. T. 239], and she answered "No, I am not." [R. T. 239]. The fact that this witness had several conversations with Government personnel prior to the trial in the instant case was brought to the attention of the jury [R. T. 291-311; 321-335].

Finally, counsel for appellant very ably and lucidly attacked witness Dunn's credibility in his closing argument to the jury:

"Now the other so-called direct evidence is from Jacqueline Rochelle Dunn. She has not been brought to trial by the Government of the United States although she has been indicted. Would she have a motive? When I would ask her a question, a most simple question, it would take her one, two or more minutes. Do you know what that means? She has got to say something to destroy Leroy Ray and protect herself. She wants to ingratiate herself with Mr. Nobles and other representatives of the Government so that whenever she comes to trial, if at all, they will remember her cooperation and go easy on her and do something for her.

"I ask you, is she biased? When Mr. Nobles would ask her a question that tended to incriminate Mr. Ray her answer was instantaneous, the great hesitancy was not there, but when we questioned her she had to formulate her thoughts.

"I can appreciate when you listen to her, her hesitancy, you may read many things into it, but I suggest the thing that existed there was the fact that she hoped to gain favor and perhaps heap some ridicule or scorn upon Mr. Ray for whatever reason she had." [R. T. 714, 715]

It is clear, therefore, that any limitation of inquiry into witness Dunn's interest in testifying in no way impaired counsel for appellant in his campaign to cast doubt upon the credibility of this witness' testimony. In a similar case, Johnson v. United States, 356 F.2d 680, 683 (8 Cir. 1966), the court held:

"A review of the entire cross-examination on the case in chief and in rebuttal discloses that appellant's counsel brought out before the jury the circumstances of his arrest . . . and was permitted adequately to show to the jury that this witness may have been influenced by the fact that he was not prosecuted by the Government . . . We find no prejudicial error in the court's cutting off the cross-examination of Vaughn and sustaining an objection at the time it did."

Ray cites several cases to support his claim that the trial court unduly restricted the scope of cross-examination during the testimony of witness Dunn. An examination of each of these cases, however, fails to reveal any relevance to the issues in this appeal.

Ray cites Grant v. United States, 368 F.2d 658 (5 Cir. 1966), wherein the appellate court ruled that it was prejudicial error for the trial court to prevent defense counsel from asking a witness about possible discussions held prior to entry of a guilty plea. This case is indeed inapplicable to the facts of the instant case wherein appellant's counsel was allowed to conduct a searching

inquiry into the nature and content of various discussions involving witness Dunn and Government personnel prior to trial [R. T. 291-311; 321-335].

The court in Beaudine v. United States, 368 F.2d 417 (5 Cir. 1966), found reversible error due to the cumulative effect of restrictive rulings concerning foreclosing inquiry into former felony convictions and inquiry into a previous refusal of the witness to give a statement unless he was paid \$500. A review of the record in the instant case reveals no such restrictive rulings as in Beaudine. Counsel for appellant was allowed inquiry into witness Dunn's possible previous felony convictions [R. T. and there is no indication that he was denied inquiry into any similar possibility of bribery. It is important to note that the court in Beaudine, supra, concluded: "Neither of the two incidents expressly complained of here would alone justify reversal. . . ." (at p. 424) In the instant case, the record fails to reveal even one such incident which, standing alone, would be prejudicial error under Beaudine, supra.

Farkas v. United States, 2 F.2d 644 (6 Cir. 1924), as cited by appellant, is not persuasive. There the trial judge not only limited inquiry into motive or bias, but also refused to give an instruction in this area. In addition, the judge also expressly instructed counsel not even to argue before the jury concerning the effect of an upcoming sentencing on the witness' motive for testifying. In the case at bar, Ray offered no instructions concerning this issue, and, as quoted above, was permitted

extensive argument regarding motive and bias.

In Meeks v. United States, 163 F.2d 598 (9 Cir. 1947), one of the four grounds for reversal was based on the trial court's arbitrary disallowance of any inquiry into the witness' motive or reason for testifying. As indicated above, counsel for appellant made extensive inquiry and comment concerning witness Dunn's interest in testifying. The other three grounds for reversal in Meeks, supra, are in no way relevant to the issues presented by Ray.

Ray's citation of Napue v. Illinois, 360 U.S. 264 (1959), is not in point whatsoever because that case was concerned with the knowing use of false testimony by the State. The court concluded: "Our evaluation of the record . . . compels us to hold that the false testimony used by the State . . . may have had an effect on the outcome of the trial." (at p. 272) In the instant case, there is no similar claim.

In Alford v. United States, 282 U.S. 697 (1931), the court held it to be prejudicial error to sustain objections to the question "Where do you live," as being immaterial. In the instant case the record reflects that witness Dunn was asked by counsel for appellant, "Were you a resident of Los Angeles County all of your life?", and she replied "Yes." [R. T. 290].

The court in Gordon v. United States, 344 U.S. 414 (1952), found reversible error based on a failure to allow the use of conflicting written statements and a transcript of the sentencing judge's admonishments to the witness in the trial of an accomplice.

Ray has not raised any similar issues in the instant case.

Turning to another point, appellant next questions the propriety of the trial judge's ruling that the question "What is the business of occupation of Mr. Dunn?", was objectionable [R. T. 289]. First, Ray is precluded from raising this issue for the first time on appeal since no objection was offered at trial. Hill v. United States, supra; Gilbert v. United States, supra.

Even if this issue has been preserved for appeal, the trial judge's ruling was well within the scope of his discretionary power to control the scope of cross-examination. Hendrix v. United States, supra. Counsel for appellant never attempted to support the relevancy of this inquiry; and no authority has been cited to indicate that the ruling was in fact improper.

Ray claims that the trial judge should not have limited inquiry into the possible existence of other indictments and or bail releases with respect to witness Dunn. Clearly, the trial judge's foreclosure of these inquiries was proper. As stated by this Court in Thurman v. United States, 316 F.2d 205, 206 (9 Cir. 1963), "It was error to suggest by leading questions on cross-examination of appellant that he had participated in specific acts of criminal conduct, not resulting in convictions, other than those with which he was charged. The questions could not be justified as impeachment; 'only a conviction . . . may be inquired about to undermine the trustworthiness of a witness.' " [Quoting Michelson v. United States, 335 U.S. 469, 482 (1948)]. Ray went beyond the scope of permissible cross-examination when he asked witness Dunn about

the possibility that she was out on bail in other cases [R. T. 290], or under indictment in an unrelated case [R. T. 296].

Counsel for appellant was, nevertheless, allowed to inquire about possible past felony convictions. On page 312 of the Reporter's Transcript, he asked witness Dunn: "You yourself haven't suffered a conviction of a felony, have you Mrs. Dunn?", and she replied "No, I haven't." [R. T. 313]. Counsel for appellant was in no way restricted from inquiring into witness Dunn's criminal record through the use of acceptable questions concerning her past convictions. In addition, the jury was made aware of the fact that witness Dunn was under indictment in this case and that she was out on bail.

Ray further asserts that the trial court unfairly limited inquiry into witness Dunn's state of mind. Counsel for appellant asked this witness: "You say you changed your mind about this case when you telephoned Mr. Peterson. How many times have you changed your mind with respect to this case?" The trial court sustained an objection to this question on the grounds that it was vague and indefinite [R. T. 303].

Although no objection was made at trial and even if this issue is properly before this Court, Ray cannot assert prejudicial error since there is absolutely nothing in the record to indicate that counsel for appellant was in any restrained from making further similar inquiries. The phrasing of the question was objected to, not the subject matter covered by the question. This inquiry could have been easily re-phrased had counsel for appellant

desired to pursue this avenue of questioning.

Ray is concerned with a possible inconsistency in witness Dunn's testimony and the purported inability of counsel for appellant to adequately explore this area [App.Br. 10]. The possible inconsistency raised by Ray touches the question of whether or not witness Dunn was under indictment before she decided to testify on behalf of the Government. To clarify this issue, counsel for appellant asked that the record be read from the previous day concerning witness Dunn's relevant testimony. The trial judge ruled that this would be improper and stated: "I think the jury is going to have to depend on their own recollection in that respect. As I recall, her testimony was that after she was indicted that she telephoned Mr. Peterson." [R. T. 312].

Ray fails to present any authority supporting his claim that the trial judge was required to have the record re-read. If counsel for appellant was really concerned about the prior testimony, he was free to secure a copy of the relevant portions of the transcript for use in further cross-examination. Following the witness' testimony, for the second time, regarding the sequence of indictment and her decision to testify, the trial was continued from Thursday, November 9, 1967, to Tuesday, November 14, 1967. Certainly this afforded counsel for appellant sufficient time to obtain a copy of the questioned testimony. As pointed out by the trial judge on the following Tuesday: "You are retained counsel and you can have the reporter write up whatever portions of the testimony you want at the rates which the Government fixes for him

to receive if you think you need that in your cross-examination or in your summation to the jury." [R. T. 344].

Finally, as pointed out in United States v. Kahaner, 317 F.2d 459, 485 (2 Cir. 1963), cert. denied 375 U.S. 836 (1963): "Absolute perfection in trials will not be attained so long as human beings conduct them. . . ."

Ray also questions the sufficiency of the instructions given concerning bias or prejudice of witnesses. Although no objection was made at trial, and even assuming this issue is properly raised, it is clear that no error exists since the instructions given were both proper and sufficient. Ray is only concerned with the sufficiency of these instructions; he does not challenge their propriety. Ray is in error when he states that the relevant instructions " . . . were limited to a single sentence. . . . " The record will clearly reflect that the instructions concerning bias and prejudice are set forth at length on pages 735, 736 and 742 of the Reporter's Transcript.

Lastly, there is nothing in the record of this case to indicate that counsel for appellant offered any additional instructions in an effort to correct the purported deficiency.

In conclusion, it is clear that the boundaries of cross-examination were appropriately defined during the testimony of witness Dunn, that the instructions concerning bias and prejudice were proper and sufficient, and that the trial judge exercising his discretion, was indeed a fair magistrate dealing impartially and justly with concededly a difficult witness.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROOSEVELT MONTGOMERY,

Appellant,

VS:

UNITED STATES OF AMERICA,

Appellee.

FEB 21 1960

FILED

1960

APPELLEE'S BRIEF

WM. B. LUCK

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.
United States Attorney

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TOPICAL INDEX

| | <u>Page</u> |
|---|-------------|
| Table of Authorities | ii |
| I STATEMENT OF ISSUES | 1 |
| II STATEMENT OF FACTS | 2 |
| III ARGUMENT | 13 |
| A. DEFENDANT'S FAILURE TO SIGN THE WAIVER ACCOMPANYING THE MIRANDA ADMONITION DOES NOT PRECLUDE THE INTRODUC- TION OF DEFENDANT'S VOLUN- TARY ADMISSIONS IN EVIDENCE AT HIS TRIAL | 13 |
| B. TESTIMONY OF AN INFORMANT IS ITSELF SUFFICIENT TO SUPPORT A CONVICTION | 20 |
| C. THE SENTENCE IMPOSED BY THE TRIAL COURT WAS PROPER AND NOT AN ABUSE OF JUDICIAL DISCRETION | 22 |
| D. THE STATUTORY RULE OF EVI- DENCE PERMITTING CONVICTION UPON EVIDENCE OF UNEXPLAINED POSSESSION OF HEROIN IS NOT UNCONSTITUTIONAL | 25 |
| E. THE MARCHETTI, HAYNES AND GROSSO DECISIONS DO NOT PRO- VIDE A BASIS FOR NULLIFYING 21 U.S.C. §174 | 29 |
| F. THE INDICTMENT NEED NOT ALLEGE IN WHAT RESPECT THE IMPORTATION OF HEROIN WAS UNLAWFUL | 33 |
| CONCLUSION | 34 |

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page</u> |
|--|-------------|
| Arrizon v. United States, 224 F. Supp. 26 (S. D. California 1963) | 33 |
| Audett v. United States, 265 F. 2d 837 (9th Cir. 1959) | 21 |
| Brown v. United States, 222 F. 2d 293 (9th Cir. 1955) | 23 |
| Bryson v. United States, 265 F. 2d 914 (9th Cir. 1959) | 23 |
| Coughlan v. United States, 391 F. 2d 371 (9th Cir. 1968) | 18 |
| Coyote v. United States, 380 F. 2d 305 (10th Cir. 1967), cert denied 389 U. S. 976 | 15 |
| Erwing v. United States, 323 F. 2d 674 (9th Cir. 1963) | 26, 28 |
| Green v. United States, 386 F. 2d 953 (10th Cir. 1967) | 16 |
| Grosso v. United States, 390 U. S. 62 (1968) | 29, 33 |
| Gurara v. United States, 40 F. 2d 338 (8th Cir. 1930) | 23 |
| Haynes v. United States, 390 U. S. 85 (1968) | 29, 33 |
| Hernandez v. United States of America, 300 F. 2d 114 (9th Cir. 1962) | 26 |
| Juvera v. United States of America, 378 F. 2d 433 (9th Cir. 1967) | 26 |
| Keegan v. United States, 385 F. 2d 260 (9th Cir. 1967) | 16 |
| Leary v. United States, 392 U. S. 903 (1968) | 29 |
| Marchetti v. United States, 390 U. S. 39 (1968) | 29, 33 |

| | |
|--|--------------|
| Miranda v. Arizona, 384 U.S. 436 (1966) | 1, 13, 15-19 |
| Moore v. United States, No. 22,501 (9th Cir.) Oct. 22, 1968 | 18-20 |
| Morgan v. United States, 391 F.2d 237 (9th Cir. 1968) | 27 |
| Russell v. United States, 288 F.2d 520 (9th Cir. 1961) | 23 |
| Sherman v. United States, 261 F.Supp. 522 (D.C. Hawaii 1966), aff'd 383 F.2d 837 (9th Cir. 1967) | 25 |
| United States v. Gainey, 380 U.S. 63 (1965) | 26-27 |
| United States v. Hayes, 385 F.2d 375 (4th Cir. 1967) | 18 |
| United States v. Karavias, 170 F.2d 968 (7th Cir. 1948) | 24 |
| United States v. Minor, No. 31,953 (2d Cir. July 3, 1968), Slip Opinion p. 2960 | 32 |
| United States v. Reyes, 280 F.Supp. 267 (S.D.N.Y. 1968) | 33 |
| United States v. Rogers, 218 F.2d 536 | 33 |
| Verdugo v. United States, No. 20,803 (9th Cir. 1968) | 27, 30 |
| White v. United States, 315 F.2d 113 (9th Cir. 1963) | 21 |
| Williams v. United States, 308 F.2d 664 (9th Cir. 1962) | 21 |
| Yee Hem v. United States of America, 268 U.S. 178 (1925) | 26 |
| Zaragoza v. United States, 389 F.2d 468 (9th Cir. 1968) | 27 |

Constitution

United States Constitution:

| | |
|-----------------|-----|
| Fifth Amendment | 1-2 |
|-----------------|-----|

Statutes

California Health and Safety Code:

| | |
|--------|----|
| §11501 | 31 |
|--------|----|

| | |
|--------|----|
| §11530 | 31 |
|--------|----|

| | |
|-------------------|---|
| 18 U.S.C. , §1291 | 2 |
|-------------------|---|

| | |
|-------------------|---|
| 18 U.S.C. , §1294 | 2 |
|-------------------|---|

| | |
|-------------------|----|
| 19 U.S.C. , §1459 | 32 |
|-------------------|----|

| | |
|-------------------|----|
| 19 U.S.C. , §1461 | 32 |
|-------------------|----|

| | |
|-------------------|----|
| 19 U.S.C. , §1463 | 32 |
|-------------------|----|

| | |
|------------------|--------|
| 21 U.S.C. , §173 | 29, 33 |
|------------------|--------|

| | |
|------------------|--------------------|
| 21 U.S.C. , §174 | 1-2, 22, 25, 29-33 |
|------------------|--------------------|

| | |
|---------------------|--------|
| 21 U.S.C. , §176(a) | 27, 29 |
|---------------------|--------|

| | |
|-------------------|----|
| 21 U.S.C. , §188b | 29 |
|-------------------|----|

| | |
|-------------------|----|
| 21 U.S.C. , §188c | 29 |
|-------------------|----|

| | |
|-------------------|----|
| 21 U.S.C. , §188d | 29 |
|-------------------|----|

| | |
|---------------------------|----|
| 26 U.S.C. , §4701 et seq. | 31 |
|---------------------------|----|

| | |
|----------------------|---|
| 26 U.S.C. , §4705(a) | 3 |
|----------------------|---|

| | |
|------------------|----|
| 49 U.S.C. , §781 | 33 |
|------------------|----|

| | |
|---------------------|----|
| 49 U.S.C. , §787(d) | 33 |
|---------------------|----|

Rule

Federal Rules of Criminal Procedure:

| | |
|------------|----|
| Rule 32(c) | 24 |
|------------|----|

Miscellaneous

U.S. Treasury Department, Bureau of Narcotics,
Traffic in Opium and Other Dangerous
Drugs (year ended December 31, 1966)

27-28

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROOSEVELT MONTGOMERY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF ISSUES

1. Did defendant's failure to sign the waiver accompanying the Miranda warning exhibited and read to him preclude the Government's use of his subsequent admissions in the trial?
2. Is the evidence of an informant legally sufficient to support the defendant's conviction?
3. Was the sentence imposed an abuse of judicial discretion by the trial judge?
4. Does 21 U. S. C. §174 require the defendant to testify against himself or otherwise invade the defendant's right against self-incrimination in violation of the U. S. Constitution

Amendment V?

5. Does the statutory evidence rule, in 21 U.S.C.

§174 irrationally associate possession of narcotics with the fact of importation contrary to law, or with knowledge by the defendant of such illegal importation?

6. Must the indictment allege in what respect the

importation of heroin is unlawful?

II

STATEMENT OF FACTS

This is an appeal by defendant Montgomery, pursuant to 18 U.S.C. §§ 1291, 1294, from a conviction for violations of 21 U.S.C. §174.

On August 9, 1967, the United States Grand Jury for the Central District of California, returned an indictment charging Montgomery and a co-defendant:

In Count Seven, with knowingly and unlawfully receiving, concealing and facilitating the concealment and transportation of 26.890 grams of illegally imported heroin, a narcotic drug, in violation of 21 U.S.C. §174 (R. T. p. 13); ^{1/} in Count Eight, with knowingly and unlawfully selling and facilitating the sale of 26.890 grams of illegally imported heroin, a narcotic drug, in violation of 21 U.S.C. §174 (R. T. 13), and, in Count Nine, with

1/ "R. T." refers to Reporter's Transcript.

knowingly and unlawfully selling 26.890 grams of illegally imported heroin, a narcotic drug, without a written order issued to the purchaser by the Secretary of the Treasury of the United States, in violation of 26 U.S.C. §4705 (a) (R. T. 14).

On September 26, 1967, before the Honorable Charles H. Carr, United States District Judge, the case proceeded to jury trial (R. T. 12).

On September 27, 1967, the jury found the defendant guilty of counts seven and eight (R. T. 205-206).

On October 9, 1967, the Court sentenced the defendant to ten years on each count, the sentences to run concurrently (R. T. 226-227).

On October 9, 1967, the defendant filed a notice of appeal (C. T. 25). ^{2/}

At the trial, one Clint Johnson, the informant (R. T. 45) testified that he had a conversation with the co-defendant Roy Nicholson on July 17, 1967, and that this conversation concerned the purchase of heroin (R. T. 46-47); that he had an additional conversation with Nicholson on July 18, 1967, concerning the purchase of heroin (R. T. 47). That after these conversations the witness, Clint Johnson, reported the substance of them to Agent Krueger of the Federal Bureau of Narcotics (R. T. 47).

On July 19th after a conversation with Roy Nicholson concerning the purchase of heroin Johnson met with Agent Krueger on 85th Street about one half block west of Figueroa Street. At

^{2/} "C. T." refers to Clerk's Transcript.

this meeting Agent Krueger gave Johnson the sum of \$175.00 and instructions on how to purchase the heroin (R. T. 50).

At this meeting Agent Krueger searched Clint Johnson and found that he had neither money nor narcotics except for the \$175.00 which Krueger had given Johnson (R. T. 51).

Following this meeting Clint Johnson went to the residence of Roy Nicholson, got out of his car, met Roy Nicholson outside and engaged him briefly in conversation and entered Nicholson's house (R. T. 52). Upon entering the house Clint Johnson was introduced to the defendant Montgomery. Montgomery said, "Let's take a ride". Then Nicholson, Montgomery and Johnson entered Montgomery's car and drove to a gas station located at San Pedro and 85th Street. Montgomery drove, Johnson was in the front passenger seat and Nicholson was in the back seat behind Johnson (R. T. 52-54).

At the gas station Montgomery said, "Give me the money", which was \$300.000. Johnson insisted upon seeing what he was purchasing. Nicholson gave Johnson \$125.00 which was then added to Johnson's \$175.00 furnished by Agent Krueger. Montgomery then reached down under the dashboard to the left of the steering wheel and removed a brown bag which contained a small balloon which contained heroin. Johnson then handed the \$300.00 to Montgomery. Montgomery placed the money in his shirt pocket, drove around the block and back to the residence of Roy Nicholson (R. T. 54-55).

At this point Montgomery let Johnson and Nicholson out of

his car and they proceeded north on Avalon Street where they were placed under arrest (R. T. 55).

Agent Joseph E. Krueger of the Federal Bureau of Narcotics took the stand for the Government. Agent Krueger testified that he had been a narcotics agent for four years (R. T. 74).

Agent Krueger testified that on July 19, 1967, he met Clint Johnson, searched him and his vehicle and -- finding neither money nor narcotics furnished him with \$175.00 of official funds, the serial numbers of which had previously been recorded (R. T. 75-76). Shortly thereafter, Johnson drove to Nicholson's house while Agent Krueger was in surveillance. He saw Johnson meet Nicholson; then both entered the house and disappeared from sight for perhaps five minutes.

Between 1:00 p.m. and 1:10 p.m. Nicholson, Johnson and Montgomery exited the house and entered a 1964 white over pink Cadillac and drove to a gas station at the corner of 85th and San Pedro Streets. They remained there for about five minutes, after which time the vehicle was observed to circle the block and return to Nicholson's house (R. T. 76-77). At that point the vehicle parked and Johnson and Nicholson got out, entered another vehicle and drove away from the area under Krueger's surveillance. As he was leaving Krueger observed the defendant Montgomery walk to the front porch area of 352 East 85th Street (R. T. 77-78). At approximately 1:15 or 1:20 in the afternoon about three or four blocks from the 85th Street residence Krueger received the hand signal from Johnson indicating the sale had been made.

At that time Krueger arrested Johnson and Nicholson. The arrest of Johnson was designed to protect Johnson from the others and throw them off of the scent. The heroin was removed from under the dashboard of the vehicle to the left of the steering column (R. T. 78-79).

Agent Krueger then proceeded with other agents to the address on 85th Street where he observed the defendant Montgomery standing in front of the residence. Krueger then with Agent Paulis accompanying him walked up to the defendant Montgomery and advised him that he was being arrested for violation of the Federal Narcotics Laws. Agent Krueger then searched Montgomery and retrieved a quantity of money from his person (R. T. 79-80).

Subsequent to the arrest Agent Krueger went with the defendant Montgomery to the Los Angeles branch office of the Bureau of Narcotics where the money recovered from Montgomery was found to be a part of the \$175.00 which Krueger had furnished Johnson (R. T. 80-81). After determining this agent Krueger admonished the defendant Montgomery of his constitutional rights as follows:

BY MR. GLASSMAN:

Q Tell us at what time, if you recall, you advised this defendant of his constitutional rights, where it was and who was present.

A I advised personally, myself, first advised Mr. Montgomery of his constitutional rights at

approximately 2:00 p. m. here in my office in this building on the 19th of July, and I was in the presence of Agent Jarrett, Agent Paulis, and Agent Osmut at that time.

Q Would you tell us, please what rights you advised this defendant of.

A Yes, sir. I once again advised him that he was under arrest for violation of the federal narcotic laws. I advised him that he need not make any statement to me, that if he did make any statement to me it could be used against him in a court of law; that he did have a right to an attorney; and if he so desired an attorney he could have one at any time during those proceedings or any proceedings thereafter; and that if he could not afford an attorney, the Government would provide one for him.

Q And did Mr. Montgomery indicate in any way that he had heard and understood the constitutional admonition which you had given to him?

A Yes, sir, he did. He said that he understood his rights, I further asked him to read a form which our agency uses to formally advise them in writing of their rights, and I asked him if he wished to sign the form indicating simply that he understood his rights but he did not wish to sign any forms whatsoever.

Q At that time, after you had advised the defendant of his constitutional rights, as you have just testified to, were there any statements made to you by the defendant?

A Yes, sir, there were.

Q Would you tell us and relate to the jury that conversation.

MR. COCHRAN: Just prior to that, may I have one or two questions on voir dire?

THE COURT: Yes, I will allow it.

MR. COCHRAN: Thank you very kindly, your Honor.

VOIR DIRE EXAMINATION

BY MR. COCHRAN:

Q Just briefly, Agent Krueger, at any time did Mr. Montgomery request that you call an attorney for him?

A No, he did not.

Q At any time did you tell him that although he had a right to an attorney he didn't need one because the two of you could work something out?

A No, I did not.

Q Did any other agent in your presence ever make that statement?

A Not to my knowledge, sir.

MR. COCHRAN: Thank you.

I have nothing further on voir dire,
your Honor.

THE COURT: Proceed.

DIRECT EXAMINATION (Resumed)

BY MR. GLASSMAN:

Q Would you relate the substance of the
conversation that you had with the defendant Mont-
gomery.

A Yes, sir.

MR. COCHRAN: Your Honor, I will object to
any conversation on the ground that I think we should
have an offer of proof on the grounds that the total
statement may be hearsay. There may be certain ad-
missions, but the total statement may very well be
hearsay.

THE COURT: I will allow the statement. I
don't think it could be if it is in the presence of the
defendant. I will allow the statement.

MR. COCHRAN: Very well, your Honor.

THE COURT: Go ahead, counsel.

BY MR. GLASSMAN:

Q Would you please answer, Agent Krueger.

A Yes, sir. Just shortly after I had advised

Mr. Montgomery of his constitutional rights, I was taking and completing a form which we consider a personal history sheet, a form which encompasses the name, date of birth, place of birth, names of relatives, places of residence, things of this nature.

Mr. Montgomery was talking to me in a very cooperative way and indicated to me in a questioning way whether or not it would be possible for him to shall we say cooperate through his activities for some future perhaps mitigation in his violation.

I said that I did not know if that would be possible.

I went on to ask him what the circumstances were concerning the present day's activities, and if he understood why he was being arrested.

He said yes, he did. He said that he had been a fool. He said that he had delivered the heroin which I had in my presence, to his brother and to Mr. Johnson on this date. He stated to me that he had done this to Mr. Nicholson or done this with Mr. Nicholson before; however, on no occasion had he ever delivered the heroin to the address on 85th Street.

He stated that he had become impatient on this particular occasion because the money had not been made available, and he had decided to bring the heroin over there.

I asked Mr. Montgomery where he had obtained the heroin, and he said he had obtained his heroin from a source of supply by the name of Hernandez in the East Los Angeles area.

He went on to add that his normal procedure for obtaining this heroin was by contacting this Hernandez, and I believe, if I recall correctly, it was a husband and wife team, and they in turn would deliver the heroin to him to a neutral meeting place, preferably in the Santa Monica or Venice area.

I asked him on how many occasions he had delivered the heroin. I don't recall, other than the fact that it had been on more than two, and he stated to me that he had obtained as much as seven ounces of heroin at one time from this Hernandez husband and wife team.

This pretty much constitutes any statement which he made concerning that day's present activities. (R. T. 82-87).

Agent Krueger next identified the envelope in which the heroin was placed. The defense stipulated to the chain of evidence and the fact that the item alleged to be heroin was in truth heroin. The evidence was offered and received (R. T. 88-94).

On Cross-examination of Agent Krueger it was adduced by counsel for defendant that the subject of leniency was

discussed; that the defendant Montgomery was inferentially informed by Agent Krueger that he might be able to cooperate with the Government. It was pointed out, however, by Agent Krueger that this subject was discussed AFTER the admissions of the defendant (R. T. 96).

The defendant Roosevelt Montgomery took the stand and testified as to his version of the offense which was in substance that he met Clint Johnson on July 19, 1967, when he came to Roy Nicholson's house. That while he, Johnson and Nicholson were at the service station he never gave anyone a package containing heroin, or any white powdery substance (R. T. 108-109).

The only money he received at the filling station was \$25.00 given him by Nicholson to get an auto tape for Nicholson (That Clint Johnson never gave him anything at the service station (R. T. 110).

Defendant Montgomery further testified he was forcefully arrested and handcuffed and thrown in the back seat of the Agents' car (R. T. 111-12). He was then transferred to the Federal Building, mugged and fingerprinted and introduced to Agent Krueger. Krueger suggested that Montgomery could work with the agents and make it better for himself. He said, "you can work it off". Krueger explained that Montgomery could go out in the field and make a buy for him. Krueger told the defendant that his bail would be \$10,000.00 but that it could be set lower if Montgomery would work with him. Krueger also told Montgomery that he did not need an attorney because the two of them could work it out

better without an attorney. The defendant was expressly advised not to obtain an attorney. The entire conversation between Agent Krueger and the defendant lasted approximately one hour (R. T. 112-117).

On cross-examination the defendant testified that he was out of the automobile at the gas station for about two or three minutes (R. T. 120). Montgomery testified that the story he gave Agent Krueger concerning the purchase of heroin from the Hernandez couple was deliberately fabricated so that he could have his bail reduced (R. T. 123-24).

III

ARGUMENT

A. DEFENDANT'S FAILURE TO SIGN THE
WAIVER ACCOMPANYING THE MIRANDA
ADMONITION DOES NOT PRECLUDE
THE INTRODUCTION OF DEFENDANT'S
VOLUNTARY ADMISSIONS IN EVIDENCE
AT HIS TRIAL

Defendant's initial contention is his claim that once the defendant fails to sign the waiver of constitutional rights that then all questioning must immediately cease; and indeed that voluntary admissions thereafter made are inadmissible.

Agent Krueger testified that he made the following statement to defendant before conversing with him:

"A . . . I once again advised him that he was under arrest for violation of the federal narcotics laws. I advised him that he need not make any statement to me, that if he did make any statement to me it could be used against him in a court of law; that he did have a right of an attorney; and if he so desired an attorney he could have one at any time during those proceedings or any proceedings thereafter; and that if he could not afford an attorney, the Government would provide one for him.

"Q [By Mr. Glassman] And did Mr. Montgomery indicate in any way that he had heard and understood the constitutional admonition which you had given to him?

"A Yes, sir, he did. He said that he understood his rights, I further asked him to read a form which our agency uses to formally advise them in writing of their rights, and I asked him if he wished to sign the form indicating simply that he understood his rights. He said that he understood his rights but he did not wish to sign any forms whatsoever." (R. T. 82-83).

Agent Krueger stated that while he was questioning the defendant about his personal history the defendant readily admitted his complicity in the acts alleged and that he never requested counsel to assist him (R. T. 85-87).

The Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966), did not set out a specific warning which every law enforcement agency would be required to give, but rather chose to allow each agency freedom in formulating its own; the Court required only that " . . . the accused must be adequately and effectively apprised of his rights . . . " (Id. 467). Although the Court chose not to dictate a specific form, it did summarize the requisite elements of a proper warning on page 444, where it said, "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed. "

In Coyote v. United States, 380 F.2d 305 (10th Cir. 1967), cert denied 389 U.S. 976, the policy of testing a warning by its substance rather than its form was followed. The Court stated:

"Surely Miranda is not a ritual of words to be recited by rote according to didactic niceties. What Miranda does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. We will not indulge over the particular words used to inform an individual of his rights. The crucial test is whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear, understandable warning of all his rights." Id. 308.

See also Green v. United States, 386 F.2d 953 (10th Cir., 1967).

In Keegan v. United States, 385 F.2d 260 (9th Cir., 1967),

the Court found the substance of the following warning sufficient:

"You don't have to say anything without the presence of an attorney. Anything that may be said out of the presence of an attorney could be held against you in a court of law. If you don't have funds to pay for an attorney, we will appoint one." Id. 262.

Certainly, the warning administered by Agent Krueger to the defendant, conveyed the information required by the Miranda decision as adequately and effectively as the warnings cited above.

Having been properly warned of his constitutional rights consideration must now be directed to the question of whether the defendant effectively waived his constitutional rights. In this case, the defendant was advised of his rights orally by Agent Krueger and was shown a written list of his rights. On both occasions the defendant stated that he understood his rights. Defendant stated that he desired not to sign any statement (R. T. 83).

The Miranda holding does not make all statements inadmissible at trial. The Court was careful to point out that:

"In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given

freely, voluntarily without any compelling influences
is of course, admissible in evidence." Id. 478.

In Miranda the Supreme Court placed on the Government the burden of proving a sufficient waiver of the defendant's rights. The Government contends that it met this burden when it introduced testimony of Agent Krueger in which he stated that he had orally given the admonitions required and visibly exhibited them to the defendant and that defendant had replied to both in substance that he understood his rights (R. T. 83).

The record discloses that defendant never requested that an attorney be present during the interrogation; therefore, there is no evidence that Agent Krueger refused such a request or that the interrogation was in violation of the Miranda requirements. After being informed of his right to counsel appellant merely stated that " . . . he understood his rights" (R. T. 83). Once again Agent Krueger showed appellant his rights in written form and appellant made the identical response (R. T. 83). As Agent Krueger was obtaining personal background information from defendant, the defendant himself after the full admonitions which had been given, readily responded to the questions asked by Agent Krueger and made admissions concerning his complicity in the alleged acts.

After having been fully advised of his rights and indicating that he understood them, the defendant chose to speak. As such, the record clearly demonstrates a knowing and intelligent waiver.

In United States v. Hayes, 385 F.2d 375 (4th Cir., 1967), the defendant was asked whether he understood the warning, or whether he wanted the assistance of counsel. The Court held that:

" . . . we cannot accept appellant's suggestion that because he did not make a statement -- written or oral -- that he fully understood and voluntarily waived his rights after admittedly receiving the appropriate warning, his subsequent answers were automatically rendered inadmissible. Of course, the attendant facts must show clearly and convincingly that he did relinquish his constitutional rights knowingly, intelligently, and voluntarily, but a statement by the defendant to that effect is not an essential link in the chain of proof." Id. 377. (Emphasis added)

In this case the Government has shown that the defendant was asked whether he understood his rights on more than one occasion and that to each inquiry defendant answered that he did (R. T. 83). This certainly exceeds the requirements of the Hayes case.

In Coughlan v. United States, 391 F.2d 371 (9th Cir., 1968), the Court held certain statements admissible even though the record failed to disclose an express statement that the defendant waived his rights.

In Moore v. United States, (9th Cir. No. 22,501 decided Oct. 22, 1968), a recent case interpreting the Miranda case the

Court in discussing Miranda stated:

"Miranda v. Arizona, 384 U.S. 436 (1966), requires the government to show not only that the accused was effectively informed of his privilege against self-incrimination and his right to the assistance of counsel, but also that the accused knowingly and intelligently waived these rights. Moreover, 'A valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.' " 384 U.S. at 475.

Applying this language to the Moore case, the Court stated:

"The record is devoid of any evidence that appellant waived his rights before making the admissions to which Officer Pelz testified. Since we cannot say that the error 'does not affect substantial rights' (Federal Rules of Criminal Procedure, page 52(a)), or 'that it was harmless beyond a reasonable doubt' (Chapman v. California, 386 U.S. 18, 24 (1967)), the judgment must be reversed. "

In the Moore case cited above, after the defendant had been admonished as to his rights, he remained totally silent as to his understanding and/or waiver of those rights. Shortly thereafter defendant made admissions to the officer who had admonished him (R. T. 25 and 48).

It is clear that waiver may not be presumed from mere silence as in Moore, supra.

In the instant case there is a distinguishing feature which establishes a waiver of constitutional rights. Upon being advised as to his constitutional rights here defendant Montgomery did not remain silent, rather he stated that he fully understood his constitutional rights (R. T. 82-83).

Thereafter, when defendant Montgomery volunteered his admissions to Agent Krueger he did so knowingly and intelligently. His waiver of his rights was manifestly demonstrated by his breaking of silence to state that he understood the admonition and in spite of it continued to converse with Agent Krueger.

It should be noted that counsel for the defendant did not object to the introduction of the admissions of the defendant because of insufficiency of waiver or lack of proper warning, but rather objected on other and unrelated grounds (R. T. 85).

**B. TESTIMONY OF AN INFORMANT IS ITSELF
SUFFICIENT TO SUPPORT A CONVICTION**

Defendant contends somewhat nebulously that a substantial part of the Government's case rested upon the uncorroborated testimony of a Government informant. Note that defendant only contends that it was a substantial part, not the entire case (Brief for Defendant 12-15). The distinction is unnecessary as the law is settled that the entire case resulting in a conviction can rest

upon the uncorroborated testimony of an informant or accomplice.

In responding to a similar contention where the conviction was solely based on an accomplice's testimony, the Ninth Circuit in Audett v. United States, 265 F.2d 837, 846-47 (9th Cir., 1959), states:

"The short answer is that the federal doctrine which permits such conviction is sound and consonant with the rule obtaining in the law of evidence that the testimony of one witness, if believed, is sufficient to prove a fact, is approved by the Supreme Court and is firmly established in the law of this and other circuits. "

The ruling set forth in Audett, supra, was reaffirmed in White v. United States, 315 F.2d 113, 115 (9th Cir., 1963), and Williams v. United States, 308 F.2d 664, 666 (9th Cir., 1962). The reason for this rule appears to be that it is for the trier of fact to ascertain the weight and credibility to be given the testimony of an accomplice or informer, and if it is believed beyond a reasonable doubt then it is sufficient to convict.

In the present appeal the testimony of the informant is amply corroborated by Agent Krueger and the voluntary admissions of the defendant himself. It is respectfully submitted that abundant evidence and testimony exists to affirm defendant's conviction.

C. THE SENTENCE IMPOSED BY THE
TRIAL COURT WAS PROPER AND
NOT AN ABUSE OF JUDICIAL DIS-
CRETION

Defendant contends that because he pursued trial by jury he was punished unconstitutionally by the trial judge inasmuch as defendant's sentence was more severe than the co-defendant who pled guilty (Defendant's Brief 16).

Defendant was convicted on September 27, 1967, of two counts violating 21 U. S. C. §174 which states:

"§174 . . . Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition may be fined not more than \$20,000.00 . . . "

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession

shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. "

The statute above clearly states the penalty for a violation of the statute and the imposition of the sentence by the trial judge can extend to the maximum and is entitled to the greatest credence.

"If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits by a statute. " See Gurara v. United States, 40 F. 2d 338, 340-41 (8th Cir. , 1930).

The Ninth Circuit has repeatedly refused to question or interfere with the trial judge's discretion in imposing a sentence when it is within the statutory limit. See Bryson v. United States, 265 F. 2d 914 (9th Cir. , 1959); Brown v. United States, 222 F. 2d 293, 298 (9th Cir. , 1955); Russell v. United States, 288 F. 2d 520, 524 (9th Cir. , 1961).

The sentence imposed upon defendant was ten years in the custody of the Attorney General on each count, both sentences to run concurrently, which obviously is not the maximum punishment which could have been imposed.

Defendant has based his argument on this point upon a portion of the trial court's remarks which are taken completely out of context which, even though unavailing, give the remarks more

importance than they have in context (Defendant's Brief 17).

What must be considered to place these remarks in context is that the trial judge referred this case to the Probation Department for the purposes of receiving a pre-sentencing report (R. T. 210). At the time of sentencing, the probation report and evaluation was discussed at length between the trial judge and counsel for defendant (R. T. 217-226).

The trial court made it abundantly clear that the main consideration in sentencing the defendant was the information contained within the probation report itself.

Based upon the above-mentioned facts, it is respectfully submitted that defendant's contention that the sentencing was made more severe because of the defendant's exercise of trial by jury is frivolous, erroneous and without merit.

There exists a line of authority establishing that it is a matter of discretion for the trial court to have a pre-sentence report prepared. In United States v. Karavias, 170 F.2d 968, 971 (7th Cir., 1948), the court rejected defendant's contention that Rule 32 (c), Federal Rules of Criminal Procedure, imposed an obligation on the District Court judge to have a pre-sentence report prepared prior to sentencing. The court said:

"[R]ule [32 (c)] plainly indicates that the mandate is upon the probation officer and not upon the court. The court is not obliged to order a pre-sentence report or to utilize the services of the probation department prior to passing sentence."

This same rule was applied by the Ninth Circuit in the case of Sherman v. United States, 261 F.Supp. 522, 532; D. C. Hawaii (1966), aff'd 383 F.2d 837 (9th Cir. , 1967), where the court stated:

"Although the normal procedure before sentencing is that the pre-sentence investigation is made and presented to the court, there is nothing in any of the statutes or rules which demands that such a pre-sentence investigation or report be made, filed with the court or considered by the court before sentencing. "

The defendant Montgomery's contention that the severity of his sentence was determined solely upon his availing himself of a jury trial is without merit. In fact, the manner in which the sentencing was conducted by the trial judge was an exemplary procedure, giving full consideration to all pertinent facts and giving defendant full opportunity to present all facts on his behalf.

D. THE STATUTORY RULE OF EVIDENCE PERMITTING CONVICTION UPON EVIDENCE OF UNEXPLAINED POSSESSION OF HEROIN IS NOT UNCONSTITUTIONAL

Defendant's attempt to reverse his conviction because the trial court might have applied the statutory rule of evidence is without merit. It is clear that the provision in 21 U.S.C. §174 which permits conviction upon a showing of unexplained possession of the narcotic drug heroin, functions as a ". . . statutory rule

of evidence . . . " Erwing v. United States of America, 323 F.2d 674, 679 (9th Cir., 1963). Cf. United States v. Gainey, 380 U.S. 63 (1965). As this Court said:

"Thus the function of 'possession' in the statutory scheme is to shift to the defendant the burden of identifying the legitimate source of the narcotic drugs, if indeed they were not illegally imported. This statutory rule of evidence rests upon (1) the rational relationship between 'possession' of narcotic drugs by the defendant and knowledge on his part that a substance which is normally imported and rarely imported legally, was in fact imported contrary to law, plus (2) as a corollary, the consideration that the 'possessor' of the narcotic drugs has so much more convenient access to the facts as to their source that it is not unreasonable to require him to come forward with an explanation. Hernandez v. United States of America, 300 F.2d 114, 118, 119 (9th Cir., 1962)."

The Supreme Court and this Court have repeatedly upheld the rationality of this rule when dealing with heroin. Yee Hem v. United States of America, 268 U.S. 178 (1925). In Juvera v. United States of America, 378 F.2d 433, 437 (9th Cir., 1967), this Court described the charge of unconstitutionality as " . . . an utterly groundless assertion." When the challenge

arose in a prosecution under 21 U.S.C. §176 (a), this Court rejected it. Zaragoza v. United States of America, 389 F.2d 468 (9th Cir., 1968).

In United States v. Gainey, 380 U.S. 63 (1965), an analogous statutory inference was sustained by the Supreme Court. It said:

" . . . the constitutionality of the legislation depends upon the rationality of the connection 'between the facts proved and the ultimate fact presumed' (citation). The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." (at pp. 66, 67).

This Court recognized the rationality, when heroin is the narcotic drug, in two recent cases. Verdugo v. United States, No. 20,803 (9th Cir., 1968) slip opinion; Morgan v. United States, 391 F.2d 237, 238 (9th Cir., 1968). In both cases, the court relied upon statutory sources and common experience. It can, of course, also rely on its collegiate experience of many years and thousands of cases, like those cited, and like this one, where the evidence shows the foreign origin of the contraband.

The report by the U. S. Treasury Department, Bureau of



Narcotics, for the year ended December 31, 1966, entitled

"Traffic in Opium and Other Dangerous Drugs" states:

"There are two main currents of illicit traffic in opium and the opiates; one from the Middle East to North America; the other from southeast Asia to Hong Kong, Japan, China (Taiwan) and the west coast of North America. Secondary flows include routes from Mexico to the United States. The American continent is a principal target of the illicit heroin traffic." (at p. 31).

Granting the rationality of this rule of evidence, defendant has no standing here to raise it. The evidence established defendant in possession of heroin and the direct evidence supports a conclusion that the heroin was imported contrary to law and that the defendant knew it.

Erwing v. United States, 323 F.2d 674 (9th Cir., 1963), relied upon by defendant, is distinguishable. The defendant there introduced evidence to show that the operation of the statutory rule in that case would not be rational because there was no way to tell whether the cocaine involved was imported. Cocaine was legally manufactured and distributed in the United States, and there was no evidence to show the defendant in possession of any substance which was not legal in the United States. In this case, defendant introduced no evidence of any kind with respect to the rationality of the statutory rule.

Further, in our case, there was evidence that the statutory rule was operating rationally. As to heroin, the rule always seems to be rational, considering the present laws. See 21 U.S.C. §§ 173, 188b, 188c, 188d.

The adoption of defendant's position regarding the statutory rule would vastly increase the already great difficulty of controlling the illegal, clandestine traffic in heroin. The only beneficiaries would be the importers, distributors and wholesalers engaged in this illicit industry. The constitution does not require, and sound policy forbids this result, unless a compelling, overriding interest can be shown. Congress and the President, in enacting these statutes, have said none exists, and defendant has not given this Court any reason to contradict that judgment. (In Leary v. United States, 392 U.S. 903 (1968), certiorari has been granted on this issue.)

E. THE MARCHETTI, HAYNES AND GROSSO
DECISIONS DO NOT PROVIDE A BASIS
FOR NULLIFYING 21 U.S.C. §174

Defendant's mysterious, unexplained contention that the decisions in Marchetti v. United States, 390 U.S. 39 (1968), Grosso v. United States, 390 U.S. 62 (1968), and Haynes v. United States, 390 U.S. 85 (1968), are authority for the proposition that 21 U.S.C. §§ 174, 176a "directly or indirectly [violate] the privilege against self-incrimination", is incorrect. [Defendant's Brief, p. 21]. Neither the reported decisions nor an analysis of the statute sustains



defendant's contention.

An analysis of the operation in this case of 21 U.S.C. §174 shows the claim to be untenable. Defendant has not been convicted of failing to register his possession of the heroin. He has been convicted, in both counts, of "receiving, concealing and facilitating the transportation and concealment." Defendant could not have complied with either statute by registering his intent to possess before, or his possession after, he acquired the contraband. The only point at which a declaration could have affected the character of the contraband was at the time and place of entry into the United States.

The tax statutes, which do contain registration requirements, are not part of this statutory scheme. This Court has already recognized that there is no relationship between 21 U.S.C. §174 and some of the narcotics taxing statutes. In Verdugo v. United States of America, No. 20,803 (9th Cir., 1968) (slip opinion, pp. 8 and 9), the court said:

"None of the cases cited in Mathes-Devitt's work in support of the instruction suggests this interrelationship between 21 U.S.C. §174 (1964) and the narcotic-taxing statutes 26 U.S.C. §§ 4701-4707 (1964). We have found none that do. 26 U.S.C. §4704 (a) (1964) can be traced no farther back than the act of February 24, 1919, 40 Stat. 1131, or perhaps, considered more generally, the Act of December 17, 1914, 38 Stat. 785. The origins of 21 U.S.C.

§174 are found in the Act of February 9, 1909, 35 Stat. 614. When Congress made it an offense to "conceal" narcotic drugs in 1909 it could hardly have had in mind their failure to satisfy a tax obligation which did not exist until 1919, or 1914, at the earliest."

There are other federal statutes relating to heroin, 26 U. S. C. §4701 et seq. and other state statutes relating to heroin. See California Health and Safety Code, §§ 11530, 11501. Defendant could have been convicted on some of them on this evidence. But while he might have avoided some of those prosecutions by registration, he could not have avoided these, once he acquired the contraband. Convictions under other statutes are not before this Court in this case.

Further, 21 U. S. C. §174 is not directed towards a highly selective group inherently suspect of criminal activities. This Court should not accept defendant's implied argument that "the narcotic drug business consists entirely, or even in the main, of shadowy figures in the underworld passing small glassine bags in dark alleyways . . ."

"As of December 1966 there were 394,193 persons duly registered under the narcotics laws who were authorized to obtain written order forms from the government and engage legitimately in narcotic drugs transactions, and of these only one

§174 are found in the Act of February 9, 1909, 35 Stat. 614. When Congress made it an offense to "conceal" narcotic drugs in 1909 it could hardly have had in mind their failure to satisfy a tax obligation which did not exist until 1919, or 1914, at the earliest."

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"As of December 1966 there were 394, 193 persons duly registered under the narcotics laws who were authorized to obtain written order forms from the government and engage legitimately in narcotic drugs transactions, and of these only one

person was prosecuted during 1966 for a violation . . . [in 1966] over 170,000 kilograms of opium and over 260,000 kilograms of coco leaves were imported legally into the United States while only approximately 100 kilograms of narcotic drugs were seized or purchased in the illicit market by federal agents . . . It would not be factual to say of the narcotic statutes and regulations what the Supreme Court said of other more general tax provisions - that they are 'directed at the public at large' . . . It would be equally inaccurate, however, to say, that they are 'directed at a highly selective group inherently suspect of criminal activities.' (United States v. Minor, No. 31953 (2d Cir., July 3, 1968) (slip opinion, at pp.2960, 2961).

21 U.S.C. §174, in connection with this indictment, does not accuse defendant of any crime for failing to declare the heroin at importation. His crime is receiving, etc. a particular class of heroin, that is, that which ". . . theretofore had been imported and brought into the United States contrary to law."

Any merchandise being brought into the country must be declared at the time of importing, or as soon thereafter as is practicable, to the customs officer. 19 U.S.C. §§ 1459, 1461, 1463. The heroin would not have been permitted through.

21 U.S.C. §173. At that point, it would not have the character

necessary to a conviction under 21 U.S.C. §174, United States v. Reyes, 280 F. Supp. 287 (S.D.N.Y. 1966), Arrizon v. United States, 224 F. Supp. 26 (S.D. Calif. 1963). If the heroin were seized under 49 U.S.C. §§ 781, 787 (d), the matter would be ended. Only after the heroin is imported contrary to law, does it fall within the class which permits conviction under 21 U.S.C. §174. Defendant, if he was the importer, cannot complain of his own failure to see that the customs law was satisfied at a time when he would not have been convicted, and, if he was not the importer, he was required to declare nothing.

The pith of defendant's contention seems to be that Marchetti, Grosso and Haynes permit him to participate in the importation of narcotics, and the violation of customs law, without criminal penalty. That position should be rejected.

F. THE INDICTMENT NEED NOT ALLEGE
IN WHAT RESPECT THE IMPORTATION
OF HEROIN WAS UNLAWFUL

The general rule is that an indictment tracking the statute sets out the elements of the offense and will be held sufficient. This principle has been applied to indictments similar to the defendant's.

In United States v. Rogers, 218 F.2d 536, the court states in discussing U.S.C. §174:

"It will be observed that the statute denounces: (1) fraudulent or knowing importation



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'It will be observed that the statute denounces: (1) fraudulent or knowing importation



or bringing in of any narcotic drug contrary to law; and (2) receiving, concealing, etc., any such narcotic drug, after being imported or brought in, knowing the same to have been imported contrary to law. The indictment here follows the exact language of the second clause of the statute. The phrase, 'contrary to law,' as used in the first clause, is not a part of the offense defined in the second clause. Even if it had been used there, it is difficult to understand how a defendant could know that a narcotic drug had been imported contrary to law unless it had been so imported."

The above language is dispositive of defendant's contention.

CONCLUSION

For the reasons stated above, the conviction should be affirmed.

Respectfully submitted,

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No. 22,462

FEB 24 1953

IN THE

**United States Court of Appeals
For the Ninth Circuit**

TRUCKING, UNLIMITED, et al.,

Appellants,

VS.

CALIFORNIA MOTOR TRANSPORT Co.,
et al.,

Appellees.

**On Appeal from the United States District Court
for the Northern District of California**

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Subject Index

| | Page |
|--|------|
| Statement of the Case | 1 |
| A. The Parties | 1 |
| B. The Determination by the Federal District Court Below | 2 |
| C. The Allegations of the First Amended Complaint ... | 3 |
| D. What the Complaint Does Not Allege | 5 |
| Question Presented | 6 |
| Summary of Argument | 7 |
| Argument | 12 |
| I. The Allegations in the First Amended Complaint Do Not State a Claim Upon Which Relief Can Be Granted | 12 |
| A. The Complaint Alleges Joint Use of Regular Ad- ministrative and Court Review Procedures Ac- companied by an Anti-Competitive Motive | 12 |
| B. The Noerr-Pennington Doctrine | 13 |
| 1. The Noerr Case | 13 |
| 2. The Pennington Case | 16 |
| C. The Noerr-Pennington Doctrine Applies to At- tempts to Influence Administrative Bodies and Courts Through the Medium of Their Estab- lished Procedures | 17 |
| 1. Cases Before and Since Noerr | 17 |
| 2. The Rationale of Noerr-Pennington Applies to the Acts Alleged | 26 |
| a. Certificate Proceedings Are Policy-Making Functions Delegated by the Legislature ... | 26 |
| b. Participation by Competitors in Certificate Proceedings if a Normal and Well-Recog- nized Procedure | 27 |
| c. Protest Activities Before the PUC and ICC and Courts in Certificate Proceedings Are “Political Activity” Within the Meaning of Noerr | 29 |

| | Page |
|--|------|
| 3. The Patent Cases Relied on by Plaintiffs Are Not Pertinent | 37 |
| D. The "Sham" Exception in Noerr Does Not Apply | 39 |
| E. Economic Harm to Plaintiffs Resulting from Defendants' Alleged Activities Does Not Make the Noerr Doctrine Inapplicable | 44 |
| Conclusion | 45 |

Table of Citations

| Cases | Pages |
|--|---|
| ABT Sightseeing Tours v. Gray Line, 242 F.Supp. 365 (S.D.N.Y. 1965) | 25 |
| Association of Western Railroads v. Riss, 299 F.2d 133 (C.A.D.C. 1965) | 19 |
| Baltimore & Ohio Railroad Co. v. New York, New Haven & Hartford Railway, 196 F.Supp. 724 (S.D.N.Y. 1961) ... | 23 |
| Bracken's Shopping Center v. Ruwe, 273 F.Supp. 606 (S.D. Ill. 1967) | 24 |
| Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) | 34 |
| California Motor Transport Co. v. Public Utilities Commission, 59 Cal.2d 270 (1963) | 32, 33 |
| Citizens Wholesale Supply Co. v. Snyder, 201 Fed. 907 (3d Cir. 1913) | 17 |
| Eastern Railroad Presidents Conference v. Noerr, 365 U.S. 127 (1961) | 7, 8, 9, 10, 11, 13, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 29, 30, 31, 36, 39, 40, 44 |
| Harman v. Valley National Bank, 339 F.2d 564 (9th Cir. 1964) | 18 |
| L.A. Metropolitan Transit Authority v. Public Utilities Commission, 52 Cal.2d 655, 659 (1959) | 32 |

TABLE OF CITATIONS

iii

| | Pages |
|--|--------|
| NAACP v. Button, 371 U.S. 415 at 430 (1963) 9, 29, 30, 36, 37, 38 | |
| Okefenokee Rural Electric Membership Corporation v. Florida Power and Light Co., 214 F.2d 413 (5th Cir. 1954) | 22 |
| Oro Elec. Corp. v. Railroad Comm., 169 Cal. 466, 471 (Cal. 1915) | 32 |
| Parker v. Brown, 317 U.S. 341 (1943) | 11, 44 |
| Schenley Industries, Inc. v. New Jersey Wine and Spirit Wholesalers Association, 272 F.Supp. 872 (D.N.J. 1967) | 25 |
| United Mine Workers v. Pennington, 381 U.S. 657 (1965) | |
|7, 8, 9, 10, 11, 13, 16, 17, 22, 24, 26 | |
| U.S. v. Johns-Manville Corporation, 259 F.Supp. 440 (E.D. Penn. 1966) | 25 |
| Washington Brewers v. United States, 137 F.2d 964 (9th Cir. 1943) | 18 |
| Woods Exploration Co. v. Aluminium Co., 36 F.R.D. 107 (S.D.Tex. 1963) | 20, 23 |
| Woods Exploration Co. v. Aluminium Co., 284 F.Supp. 582 (S.D.Tex. 1968) | 20, 23 |

Codes

Public Utilities Code:

| | |
|--------------------|----|
| Section 1063 | 31 |
| Sections 1731-1736 | 28 |

Rules

Rules of Practice and Procedure,

California Public Utilities Commission:

| | |
|-------------|----|
| Rule 21 | 28 |
| Rules 53-57 | 28 |
| Rule 63 | 28 |
| Rule 75 | 28 |
| Rule 76 | 28 |

Interstate Commerce Commission:

| | |
|---|----|
| 49 C.F.R. Sections 1100.39, 1100.40, 1100.74 | 28 |
| 49 C.F.R. Section 1100.247(d)(5) | 28 |
| 49 C.F.R. Sections 1100.76, 1100.96, 1100.101 | 29 |

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|--|--------------|
| 15 U.S.C. Sections 1, 2 (Sherman Act) | 7, 8, 13 |
| 15 U.S.C. Section 12 (Clayton Act) | 7, 8, 13 |
| 28 U.S.C. Sections 1336, 1398 | 29 |
| 35 U.S.C. Sections 154, 261 | 37 |
| 49 U.S.C. (Interstate Commerce Act): | |
| Section 5(2) | 34 |
| Section 5(2)(b) | 34 |
| Section 212 | 35 |
| Section 212(b) | 35 |
| Section 212(a) | 35 |
| 49 U.S.C. 307(a) | 31 |
| 49 U.S.C. Preceding Section 1 "National Transportation Policy" (Transportation Act of 1940) | 33 |

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No. 22,462

IN THE
United States Court of Appeals
For the Ninth Circuit

| | | |
|---------------------------------|---|--------------------|
| TRUCKING, UNLIMITED, et al., | } | <i>Appellants,</i> |
| VS. | | |
| CALIFORNIA MOTOR TRANSPORT Co., | | |
| et al., | | <i>Appellees.</i> |

**On Appeal from the United States District Court
for the Northern District of California**

BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT

The jurisdiction of the Court is as stated in the brief of Appellants.

STATEMENT OF THE CASE

A. The Parties

Appellees (hereinafter referred to as "defendants") are trucking companies operating under authority granted by the California Public Utilities Commission (hereinafter referred to as "PUC") and the Interstate

Commerce Commission (hereinafter referred to as "ICC"). All of them are separate, independent entities, except that Oregon-Nevada-California Fast Freight, Inc. is under ICC-approved common control with Southern California Freight Lines, Ltd., and Ringsby Truck Lines provides certain services for Ringsby-Pacific, Ltd. With those exceptions, all of the defendants compete with one another to the extent of their operating rights for the business of transporting general commodities between various points in the State of California. Some of such traffic although transported by defendants between points wholly within California is interstate or foreign in character (as part of an interstate or foreign movement) and the balance is intrastate in character. Certain of defendants also have interstate rights authorizing them to operate in other states.

The seventeen defendants compete not only with each other but with the fifteen plaintiffs and with numerous other carriers to the extent of their respective operating rights granted by the PUC or the ICC.

B. The Determination by the Federal District Court Below

The First Amended Complaint was dismissed by the lower court on the ground that it does not state a claim upon which relief can be granted. The court stated that since the pleading had already been amended once, "presumably plaintiffs have gone as far as they can truthfully go toward alleging an antitrust violation." Memorandum of Decision, R. 64. Even so, the court granted plaintiffs an additional 15 days to amend. The plaintiffs did not accept that opportunity, but instead took this

appeal, so it must be concluded that the court below was right in its conjecture.

We emphasize this fact because the brief of plaintiffs does not stick to the allegations of the First Amended Complaint. By asserting additional allegations, pages 3-16, it sets up a hypothetical complaint which becomes the subject of its brief. This makes it difficult to focus on the complaint itself and the factual allegations which require consideration.

In concluding that the First Amended Complaint does not state a cause of action, the lower court was fully cognizant that it must resolve all doubts in favor of sustaining the complaint (Memorandum of Decision, R. 47):

“We recognize of course that a complaint should not be dismissed under Rule 12(b) (6) Fed.R.Civ.P., for insufficiency unless it appears to be a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.”

C. The Allegations of the First Amended Complaint

The allegations in the complaint are succinctly and accurately set forth in the careful summary thereof made by the court below which reads as follows (R. 45-46):

“The First Amended Complaint alleges in substance and effect (See: First Amended Complaint, par. 8, A-I, pp. 6-13) that ever since February, 1961, defendants have conspired to put plaintiffs and their other competitors out of business and for that purpose have combined their financial and other resources to carry out a consistent, systematic and

uninterrupted program of instituting through the procedural machinery of the California PUC, the ICC and of the courts, opposition to every request or application (mainly applications for certification under the public convenience and necessity provisions of the California Public Utilities Act, §§ 1061-1073) made by plaintiffs or by other competitors of defendants before such agency, and to appeal any rulings of those agencies to the courts, all 'without probable cause' and 'regardless of the merits of the cases of plaintiffs and defendants' other competitors or of the merits of defendants' opposition.'

"It is further alleged that defendants have contributed to a special trust fund for this purpose according to their respective yearly gross incomes and regardless of whether a contributor has a competitive interest in any particular request or application made by plaintiffs or other competitors; that without such an agreement to jointly finance such oppositions, such oppositions would not be made at all because of the great expense involved in such a program of protests; that, upon prevailing against plaintiffs and other competitors, defendants engage in a joint program of also resisting rehearings, reviews or appeals sought by plaintiffs or other competitors; that defendants have made known to plaintiffs and other competitors their intended program of combined and well-financed opposition in order to induce plaintiffs and their other competitors to abandon existing applications or requests and to refrain from making further applications or requests; that defendants have thus depleted the resources of plaintiffs and other competitors expended in resisting or overcoming the defendants' conspiracy of opposition; that defendants have thereby deprived the agencies and courts of the benefit of facts and in-

formation, and that defendants have defeated applications and requests of plaintiffs and other competitors on the basis of decisions which, but for defendants' combination, would not have been rendered adversely to plaintiffs and other competitors because, absent such conspiracy of opposition, no opposition would have been made."

D. What the Complaint Does Not Allege

The complaint does not allege any of the following:

1. That there was any activity in implementation of the conspiracy other than defendants' protests, petitions and appeals before the agencies and courts, and the making known of such activity.

2. That there was any agreement between defendants that they would refrain from opposing one another's applications or that in fact the defendants themselves failed to oppose one another's applications.

3. That plaintiffs or any of them were prevented by defendants from applying to the PUC or the ICC for operating authority or from presenting their proof in full before such agency or from exercising their rights of appeal or review before the courts in the event the agency refused to grant their applications.

4. That either the PUC or the ICC or any reviewing court was prevented by defendants from exercising full control over its own procedures, including the rejection of protests, complaints or appeals by defendants in the event they were found by such agency or court to constitute mere sham or an abuse of the administrative or judicial process.

5. That either the PUC or the ICC was prevented by defendants from reviewing all evidence before it and of exercising an independent judgment on the merits or that the reviewing court was prevented by defendants from exercising an independent judgment on the merits of the appeal.

6. That defendants offered false evidence or failed to present pertinent evidence or arguments to the PUC, the ICC or the courts. Indeed, the brief of plaintiffs admits that defendants in appearing before any of these tribunals made "the best case the facts would permit". Brief p. 8.

7. That it was unlawful for defendants to advocate to the PUC that it return to the strict statutory standard of public convenience and necessity in granting certificates which the PUC had abandoned for several years prior to 1961.

8. That the applications filed by plaintiffs and others were all meritorious.

9. That the protests filed by defendants were all unmeritorious.

Plaintiffs presumably knew that they could not truthfully make any of the above allegations.

QUESTION PRESENTED

Does an agreement by a group of motor carriers to protest the granting to competitors of certificates of public convenience and necessity, and the implementation of that agreement by protesting all applications by such

competitors before the California Public Utilities Commission and the Interstate Commerce Commission, making the best case the facts permit, however, and seeking to persuade the commission to apply the statutory requirements of convenience and necessity strictly, and appealing to the courts in the event of an adverse administrative ruling, and making such program of protest known, constitute a violation of the Sherman and Clayton Acts if the motive is to reduce or destroy competition, it being understood that the cost of the effort is jointly shared?

SUMMARY OF ARGUMENT

The court below correctly found that the above question should be answered in the negative and that the First Amended Complaint failed to state a claim upon which relief could be granted. The court relied on the law as enunciated by the U.S. Supreme Court in *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), as well as later cases following those decisions.

As the district court expressly pointed out in its Memorandum of Decision, the complaint does not charge acts in restraint of trade or attempts at monopoly except in the one respect that defendants associated for the purpose of intervening in regulatory proceedings to oppose plaintiffs' applications (Memorandum of Decision, R. 47):

“There is no allegation that defendants have engaged in, or conspired to engage in, any other conduct designed to restrict the competition of plaintiffs or to monopolize the industry, e.g., rate control, restriction of service, boycott or blacklisting of plaintiffs or plaintiffs’ customers or any similar conduct which might violate the antitrust laws.

“Thus, plaintiffs’ First Amended Complaint has been narrowly drawn to present the single question of whether defendants’ association for intervention in regulatory proceedings before the PUC or the ICC—without any other alleged anti-competitive conduct—is rendered violative of the antitrust laws by reason of defendants’ alleged anti-competitive purpose and intent.”

The *Noerr* and *Pennington* cases “establish the rule that violation of the Sherman Act cannot be predicated upon combined attempts to influence public officials in the enforcement of laws even when the sole purpose and intent of the persons engaging in such activity is, and the result may be, to destroy their competitors. . . . The Supreme Court has resolved the problem of bad purpose or intent *vis-a-vis* freedom of resort to public officials and agencies, by holding that the latter is to be subserved notwithstanding the risk of tolerating an anti-competitive purpose of such resort and a possible anti-competitive result.” (Memorandum of Decision, R. 51; 57-58).

The rationale of the *Noerr-Pennington* doctrine extends not only to activities directed to legislatures and executive officers of the Government but to activities directed to the courts or regulatory agencies for the

purpose of taking positions on points of fact or law pertinent to the regulatory acts. It is immaterial whether the functions of the regulatory agencies and the courts be described as executive or legislative or judicial in nature, because *whatever* they are, there is a right, *political* in nature, of access to such agencies and courts. The U. S. Supreme Court has held that the First Amendment gives the right, political in nature, of access to the judicial as well as executive or legislative branches of government, whenever such access constitutes a form of political expression. *NAACP v. Button*, 371 U.S. 415 at 430 (1963). A concomitant of the political right is the governmental need that there be a free flow of information within the bounds of established procedure.

None of the decisions since *Noerr* and *Pennington* interpret those cases to hold that the antitrust exemption applies only to attempts to influence legislatures and executive officers of government. Moreover, several cases have expressly applied the exemption to attempts, through the formal quasi-judicial processes of administrative tribunals and the judicial processes of courts, to influence those respective bodies.

The Supreme Court in *Noerr* could envision only one situation in which the doctrine therein stated might not apply, viz., when the act of petitioning to government is mere sham. 365 U.S. at 144. No such exception is effectively alleged in the First Amended Complaint although plaintiffs, being aware of the "sham" exception, no doubt went as far as they dared in attempting to set forth allegations that would fit within it. The complaint speaks in terms of delaying, discouraging, de-

tering, clogging, impeding, harassing, obstructing, making unavailable and abusing the judicial machinery. The substance of the factual allegations accompanying these abrasive adjectives, however, is simply that defendants put up a hard fight. Any protest in a court or administrative proceeding can cause delay and be said to discourage, deter or harass the other side. Any protest in a court or administrative proceeding can loosely be said to obstruct, make unavailable, clog or impede the judicial machinery. Any program of protest when known or publicized is apt to deter people from applying to the governmental body, and can irresponsibly be characterized as an abuse of the judicial machinery and a depriving of an agency of facts it might otherwise have. Any protest is apt to entail expense to applicant (as well as protestant), but that is inherent in the common law system.

If plaintiffs had been able to allege that the ICC, the PUC and the courts had become a tool in plaintiffs' hands, that all of the applications which defendants protested were meritorious, that all of the protests by defendants were unmeritorious, that plaintiffs had presented false evidence, had prevented the ICC and the PUC and the courts from controlling their own processes and from making decisions on the merits, so that the whole program of protesting might fall within the definition of "mere sham" as that term is used by the Supreme Court in *Noerr*, the plaintiffs might have had the framework of a possible valid complaint. Plaintiffs could not, however, truthfully make such allegations. Accordingly the doctrine of *Noerr-Pennington* applies.

The several patent cases relied on by plaintiffs in an effort to nullify the impact of the *Noerr-Pennington* doctrine as applied to the First Amended Complaint are simply not relevant. A patent right is a right to exclude, it is a private right akin to ownership in land or personalty or in a business. There is no element of continuing governmental policy-making or policy-enforcing with respect to it. Therefore anti-competitive acts in the use of a patent come under the strictures of the antitrust laws. A certificate right, on the other hand, is simply a right to operate. The administrative agency is given a continuing jurisdiction to determine how many, if any, identical rights or overlapping rights will be given to others. The agency acts under the broadest boundaries of the public convenience and necessity concept. Every time it acts it is acting in the realm of political activity as that term is used in *Noerr*. *Noerr* holds that in such situation the antitrust law does not apply.

The incidental economic harm coming to plaintiffs in being faced with protests in antitrust proceedings is not a basis for recovery according to *Noerr*. Also since decisions of the PUC or ICC or in courts adverse to plaintiffs are not a basis for recovery, *Parker v. Brown*, 317 U.S. 341 (1943), there is no allegation in the First Amended Complaint upon which plaintiffs can recover. Under *Pennington* there is therefore no cause of action in antitrust.

To conclude, the court below correctly decided that the complaint does not state a claim in antitrust upon which relief can be granted.

We turn now to the more detailed Argument.

ARGUMENT

I. THE ALLEGATIONS IN THE FIRST AMENDED COMPLAINT DO NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. The Complaint Alleges Joint Use of Regular Administrative and Court Review Procedures Accompanied by an Anti-Competitive Motive

The gist of the First Amended Complaint is that defendants adopted and made known a plan under which they protested all applications before the PUC or ICC for new operating authorities, or for purchase of existing operating authorities from other carriers, or for registration of intrastate operating rights with the ICC, and if the applications were granted, filed petitions for rehearing or sought review in the courts. The complaint alleges that the protests and petitions by defendants were made for the purpose of reducing or eliminating competition.

There is no suggestion that anything other than regular administrative or court review procedures were followed, or that any improper technique, such as misrepresentation, was ever employed by defendants. On the contrary plaintiffs in their brief before this court admit that defendants would always "make the best case the facts permit". Brief p. 8.

There is no allegation that defendants engaged in any other anti-competitive activity. There is no allegation, nor could there truthfully have been, that defendants agreed not to protest each other's applications. There is no allegation that plaintiffs or any of them were prevented by defendants from making applications or from presenting full proof or exercising their rights of appeal. There

is no allegation that the defendants prevented the PUC, the ICC or the courts from exercising full control over their procedures, or that such bodies were prevented by defendants from making decisions on the merits. There is no allegation that all applications by plaintiffs were meritorious or that all of defendants' protests were unmeritorious.

Thus the First Amended Complaint is narrowly drawn to present the single question whether defendants' adoption and making known of a plan to intervene in all regulatory proceedings before the PUC, the ICC and the courts—without any other alleged anti-competitive conduct—is rendered violative of the antitrust laws by reason of defendants' alleged anti-competitive purpose and intent.

B. The Noerr-Pennington Doctrine

The *Noerr* and *Pennington* cases, decided by the U.S. Supreme Court in 1961 and 1965 respectively, establish the rule that violation of the Sherman Act cannot be predicated upon combined attempts to influence the passage of laws or attempts to influence public officials in the enforcement of laws even when the sole purpose and intent of the persons engaging in such activity is, and the result may be, to destroy their competitors.

1. The Noerr Case

This case decided by the U.S. Supreme Court in 1961 was an action by a group of trucking companies under Section 4 of the Clayton Act for treble damages and injunctive relief against a group of railroads, alleging

that the railroads had engaged a public relations firm to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, that the sole motivation was injury to and ultimate destruction of the truckers as competitors, that deception was used in the campaign, and that the purpose of the railroads was more than merely an attempt to obtain legislation, it was to hurt the truckers in every way possible even though no legislation was secured, and to destroy their good will.

The trial court gave judgment against the railroads. The court declared it was not holding illegal mere efforts to influence the passage of new legislation or the enforcement of existing law. Rather it found that the railroads had violated the antitrust laws, first because the railroads' publicity campaign, insofar as it was actually directed at law making and law enforcement, was malicious in that its only purpose was to destroy the truckers as competitors, and was fraudulent in that it involved deceiving the law making and law enforcement authorities by use of the so-called third party technique; and, secondly, because an important, if not overriding purpose of the railroads was to destroy the truckers' good will, a purpose that went beyond merely attempting to obtain legislation.

The Third Circuit affirmed the trial court, but on writ of certiorari the Supreme Court reversed the judgment, holding that there was no antitrust violation upon the facts as found by the trial court. The Court started with the premise "that no violation of the Act can be

predicated upon mere attempts to influence the passage or enforcement of laws''. It then went on to the next premise that "where a restraint . . . is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." The Court then stated that (365 U.S. at 136):

"We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."

The reasons for the Court's so concluding were (1) that such associating "bears very little if any resemblance to the combinations normally held violative of the Sherman Act", (2) that a contrary interpretation of the Act "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade" by keeping people from freely informing the government of their wishes and (3) that a contrary interpretation would raise the important constitutional question of impairment of the First Amendment right to petition.

The Supreme Court further held that this conclusion is not changed (a) by the *intent* of the conspirators whatever such intent may be, including a sole intent to destroy competitors as part of the attempt to influence the passage and enforcement of laws, (b) by *deceptive* and unethical techniques in the attempt to influence the legislature and the executive, or (c) by a *purpose going beyond* merely attempting to have restrictive legislation

enacted, viz., a purpose to hurt the competitors in every way possible, even though no restrictive legislation was secured.

2. The Pennington Case

This case decided by the Supreme Court four years after *Noerr* followed *Noerr* by concluding that (a) joint efforts by a union and large coal operators to influence the Secretary of Labor to obtain establishment under the Walsh-Healy Act of a minimum wage scale for employees of all contractors selling coal to the TVA and (b) joint efforts by the same conspirators to urge the TVA to modify its policies in buying coal, did not violate the antitrust laws even though the purpose was to make it difficult if not impossible for the small contractors to compete in the TVA contract market. In relying upon *Noerr*, the court said 381 U.S. at 670:

“*Noerr* shields from the Sherman Act a concerted effort to influence *public officials* regardless of intent or purpose. . . . joint efforts to influence *public officials* do not violate the antitrust laws even though intended to eliminate competition.” (Emphasis added.)

It will be noted that the TVA, like the ICC, is an administrative agency of the federal government. The ICC is not a court but an executive administrative agency of the federal government. See *Democracy in Action* by Milford Springer, Esq., Vantage Press, 1966, page 70 et seq.

In the *Noerr* and *Pennington* cases the Supreme Court has in effect weighed the right to petition government

and the desirability of a free flow of information to the government, in balance with the factor of the antitrust intent or antitrust result respecting certain kinds of concerted activity, and has concluded that the latter factor must be risked in order to subserve governmental needs and political rights.

C. The Noerr-Pennington Doctrine Applies to Attempts to Influence Administrative Bodies and Courts Through the Medium of Their Established Procedures

In *Noerr* the conspiracy was directed at attempting to influence legislation, amongst other things by creating an atmosphere of distrust so that the Governor would veto a bill. In *Pennington* the conspiracy was directed at influencing the Secretary of Labor and TVA officials in making executive or administrative decisions. Nevertheless, the rationale of the *Noerr-Pennington* doctrine is clearly and equally applicable to attempt to influence regulatory agencies and courts, through the medium of their respective established procedures, for the purpose of taking positions on points of fact or law pertinent to the regulatory acts. The court below so found, and other courts have found to similar effect. There are no cases holding to the contrary.

In the sections which follow the cases will be reviewed first, and then the rationale will be discussed.

1. Cases Before and Since Noerr

(a) *Citizens Wholesale Supply Co. v. Snyder*, 201 Fed. 907 (3d Cir. 1913): combination by merchants' association to persuade district attorney to prosecute a competitor for violation of a local peddling ordinance.

The competitor was convicted but on appeal the ordinance was struck down as unconstitutional. The competitor then sued the merchants' association under the antitrust laws. The Third Circuit held there was no violation, saying, 201 Fed. at 910:

“In good faith and on plausible grounds they believed the law to be with them, and they had a right to try out such a controversy in the courts, although the litigation might be expensive for their antagonist as well as themselves”.

(b) *Washington Brewers v. United States*, 137 F.2d 964 (9th Cir., 1943): combination by brewing companies to influence such bodies as the California State Board of Equalization to adopt policies which would tend to restrict competitors, and combination by the same group to aid various state liquor control boards, including the California State Board of Equalization, in the policing of legislation under their respective jurisdictions. The Ninth Circuit found these alleged activities not to state an antitrust offense. The court said (137 F.2d at 968):

“We know of no reason why brewers, like other people, may not jointly advocate state legislation thought by them to be desirable, nor why they may not singly or in concert, aid the authorities *in the policing of any legislation which it is within the competency of states to adopt.*” (Emphasis added.)

(c) *Harman v. Valley National Bank*, 339 F.2d 564 (9th Cir., 1964): combination to inform the Attorney General of Arizona (alleged to have been a participant in the combination) of alleged irregularities and to per-

suade him to file a suit against a savings and loan association for irregularities under the state statute. The suit resulted in placing the savings and loan association in receivership and closing its business. This hurt the plaintiff because it was unable to get the receiver to approve a contractual claim against the savings and loan association. The plaintiff brought an antitrust action. The Ninth Circuit agreed that *Noerr* would apply whether or not the proceeding brought by the Attorney General had substantive merit, and that the defendants' conduct described above "would be essentially political in nature" and immune from attack for the reasons set forth in *Noerr*.

(d) *Association of Western Railroads v. Riss*, 299 F.2d 133 (C.A.D.C. 1965); case below is reported at 170 F.Supp.354 (D.C.D.C. 1959): combination of 58 railroads, several railroad trade associations, and a public relations firm, to carry on a program of soliciting, directly and indirectly, various state officials to take steps leading to the revocation and cancellation of interstate motor carrier operating rights held by plaintiff. A public relations expert was hired to persuade the Public Utilities Commission of Ohio to file proceedings before the ICC looking toward cancellation of plaintiff's operating authority. There also was solicitation of state and city officials to enact laws, ordinances and regulations designed to hamper and to render economically unfeasible the operations of plaintiff. Also state officials were urged to carry out a campaign of unusually strict enforcement of statutes, ordinances and regulations aimed at plaintiff's vehicles, even to the point of urging the Public

Utilities Commission of Ohio to assign special investigators to follow the plaintiff's trucks.

The combination was also alleged to have abused its privilege of intervention in proceedings before the ICC by carrying on an extensive campaign of anti-truck propaganda in order to persuade citizens' groups and others to register their complaints against plaintiff in the course of proceedings started by plaintiff before the ICC to obtain new operating authorities.

Relying on *Noerr* the Court of Appeals for the District of Columbia held all these acts beyond the reach of the Sherman Act.

(c) *Woods Exploration Co. v. Aluminum Co.*, 36 F.R.D. 107 (S.D.Tex. 1963); *Woods Exploration Co. v. Aluminium Co.*, 284 F.Supp. 582 (S.D.Tex. 1968): allegation that conspirators filed false forecasts ("false nominations") with the Texas Railroad Commission of the amount of gas that could be produced and sold from certain oil fields, as a result of which the Texas Commission issued allowance orders on plaintiff's wells that caused it economic injury; also allegation upon amended complaint that defendants made efforts to bring about a change in Commission rules and regulations; also allegation upon amended complaint that defendants instituted or defended litigation involving the validity of certain Commission rules and regulations.

Under the Texas statute the Texas Railroad Commission is given jurisdiction to limit total production from a field to the reasonable market demand for gas made upon the field. In making its allowance orders the Texas

Commission considers the monthly "nominations" filed but is not limited to them and in fact uses various periods and various criteria to determine the "reasonable market demand".

On the first round before the Federal District Court a motion to dismiss was denied on the ground, amongst others, that defendants had no constitutional right to present false nominations, and that therefore their activity did not fall within the concept of "political activity" protected from the antitrust laws. The case was appealed on procedural grounds and returned to another federal district judge (Singleton) pursuant to a docket equalization measure.

Judge Singleton reviewed the applicable cases in detail, including *Noerr* and the cases following it, and concluded that the *Noerr* doctrine should be applied. In the course of his reasoning he pointed out that since no statutory provision prescribes the procedure by which market demand is to be determined the matter falls "under the rule-making power of the Commission". This is clearly analogous to our case in which there is no statutory provision prescribing the procedure by which public convenience and necessity is to be determined.

Respecting the allegation of false nominations Judge Singleton said, 284 F.Supp. at 590:

"Plaintiffs seek to distinguish *Noerr* on the ground that it exempts only 'political activity' from the scope of the Sherman Act and thus is not controlling for, they contend, the filing of false nominations is properly 'business activity' and not 'political activity' protected by *Noerr*. This proffered distinction,

I think, places more emphasis than is warranted on the phrase 'political activity' as used by the court in *Noerr*. Plaintiffs contend that protected 'political activity' encompasses only lobbying activities or influence peddling and does not apply to a situation such as this where the defendants and all other producers are required by commission regulations to submit nominations under oath. There is some doubt whether this line of reasoning is accurate. . . . However, it is unnecessary to resolve the issue on a determination that the filing of false nominations is or is not political activity. The mere manipulation of labels does not determine the outcome of this case, for as made clear by other cases, liability is precluded if the restraint complained of results from otherwise valid governmental action even though brought about by the improper conduct of a private party."

The "other cases" referred to in the last sentence of the quotation were *Pennington*, and *Okefenokee Rural Electric Membership Corporation v. Florida Power and Light Co.*, 214 F.2d 413 (5th Cir. 1954). In our case of course there is nothing comparable to false nominations. The complaint does not allege any false presentation under oath, nor could it have truthfully done so. As plaintiffs' brief concedes, defendants made in each instance the best case they could.

With respect to the allegations that the defendants made efforts before the Texas Railroad Commission to bring about a change in that Commission's rules and regulations, Judge Singleton ruled as follows (284 F. Supp. at 594):

“As to any efforts taken by defendants before the commission to influence the commission to alter old rules or promulgate new ones, it is clear that Noerr, Pennington and Okefenokee preclude liability.”

In the instant case defendants are charged with attempting to alter the PUC's rules for determining public convenience and necessity. The *Woods* case represents a clear holding that such activity is protected by *Noerr*.

With respect to the allegation that defendants had engaged in litigation in an attempt to stop the drainage of gas from beneath their tracts because of rules prescribed by the commission, Judge Singleton once more relied upon *Noerr* in concluding that there was no cause of action under the antitrust laws. He said, 284 F.Supp. at 595:

“At least one court has held that *Noerr* applies to such joint efforts taken in the courts by holding that ‘seeking lawful . . . judicial action does not violate the antitrust laws, even if interstate commerce is involved and even if the purpose and effect is to curtail competition’. *Brackens Shopping Center Inc. v. Ruwe*, 273 F.Supp. 606 (S.D.Ill. 1967). But even if *Noerr* does not extend this far, the litigation of which plaintiffs complain cannot afford a recoverable element of damages, for it is clear that the suits were initiated with probable cause.”

(f) *Baltimore & Ohio Railroad Co. v. New York, New Haven & Hartford Railway*, 196 F.Supp. 724 (S.D. N.Y. 1961): the action challenged under the antitrust laws consisted of (a) propagandizing the Interstate Commerce Commission for the proposition that an increase in the

per diem car rate would increase car supply and eliminate car shortages, (b) propagandizing the Senate Committee on Interstate and Foreign Commerce to like effect, (c) utilizing the process of the Interstate Commerce Commission to make increased per diem charges binding upon the complainants, and (d) utilizing the process of the federal court to force payment of certain per diem charges. The court, in reliance upon *Noerr*, dismissed these contentions with the following language (page 748):

“Finally, neither the filing of suit nor the propagandizing of the commission in furtherance of plaintiffs’ joint effort to impose these rates is in violation of the Sherman Act.”

(g) *Bracken’s Shopping Center v. Ruwe*, 273 F. Supp. 606 (S.D.Ill. 1967): defendants conspired to file in the state court a representative suit challenging the validity of a statute under which the city had vacated certain streets. In granting a motion to dismiss the court said (page 607):

“Since the complaint alleges no other act or conspiracy, the court grants the defendants’ motions to dismiss because it does not believe that *resort to the judiciary*, even in concert or in an effort to restrict competition, can violate the antitrust laws of the United States”. (Emphasis added.)

The court went on to refer to *Noerr* and *Pennington* and stated that those cases stand for the general proposition that “seeking lawful legislative, executive, or judicial action does not violate the antitrust laws, even if interstate commerce is involved and even if the purpose and effect is to curtail competition.”

(h) *Schenley Industries, Inc. v. New Jersey Wine and Spirit Wholesalers Association*, 272 F.Supp. 872 (D.N.J. 1967): the allegation was that a wholesale liquor dealers' association attempted to use improper influence upon the State Division of Alcoholic Beverage Control in order to obtain favorable decisions. The court in concluding that the portions of the complaint which alleged such activities should be stricken said (page 884):

“In addition, however, Schenley continues to suggest that the lobbying itself, if sufficiently illegal apart from its antitrust aspect, is not shielded from liability under the Sherman Act. Schenley argues that Noerr and Pennington protect lobbying merely misleading or unethical, but do not extend to acts flagrantly violative of state law.

* * *

“Noerr and Pennington make clear that concerted private effort to influence government action does not violate the Sherman Act, no matter how self-interested, devious, or anti-competitive”.

(i) *ABT Sightseeing Tours v. Gray Line*, 242 F. Supp. 365 (S.D.N.Y. 1965): combination to persuade legislative bodies and administrative agencies of the City of New York to enact and promulgate laws and regulations which would suppress and eliminate competition between defendants and plaintiffs. A motion to strike this part of the complaint was granted, citing *Noerr*.

(j) *U.S. v. Johns-Manville Corporation*, 259 F. Supp. 440 (E.D.Penn. 1966): informal approach to municipal authorities to persuade them to impose restrictive specifications on pipe which the municipal authorities would

accept. Such activity was held not subject to the anti-trust laws, relying upon *Noerr* and *Pennington*.

The foregoing summary reveals that attempts to influence administrative agencies or courts were involved in seven of the twelve cases applying the *Noerr* doctrine. Moreover, while the attempts to influence were by lobbying in a majority of the cases, several involved attempts to influence through the formal processes of an administrative agency or court.

2. The Rationale of Noerr-Pennington Applies to the Acts Alleged

The rationale of *Noerr-Pennington* is that governmental bodies can act effectively only if they have access to information furnished to them through normal procedures. In the case of legislatures normal procedures consist of lobbying activity. In the case of administrative tribunals and courts normal procedures consist of intervention, pleading, presentation of evidence under oath, cross-examining, and briefing. The need by government, whenever it is engaged in policy-making or law-making functions, to receive information, and the constitutional right to petition governments must not be jeopardized by fear of antitrust violations. Therefore the antitrust laws must be construed to exempt such activity.

a. Certificate Proceedings Are Policy-Making Functions Delegated by the Legislature

The California PUC and the ICC perform a delegated legislative function in granting certificates of public convenience and necessity. Thus we find in the book *Public Utilities Regulatory Law*, Vantage Press, 1956, by the late Judge Everett McKeage, former chief counsel and sub-

sequently president of the California PUC, the following language:

“... the licensing of public utilities [i.e., the issuing of certificates of public convenience and necessity, the transferring thereof, and the revocation thereof] are legislative in nature and the [California] Commission has been constituted the lawful agency of the state to exercise such legislative authority”. Page 107.

The certificate jurisdiction of the Interstate Commerce Commission is of the same character, and each of the commissions is guided by the same legislative standard, “public convenience and necessity”.

Judge Friendly of the Court of Appeals for the Second Circuit has observed that the work of administrative agencies is work delegated by the legislature. See Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv.L.Rev. 863, 871 (1962). Professor Davis in his *Administrative Law Treatise* (1958) recognizes the legislative aspect of administrative action in Section 7.20:

“Legislative facts are often best developed through written presentations, or through an argument type of hearing, as distinguished from a trial. The proper method for meeting adverse legislative facts is often written or oral argument; occasionally convenience calls for rebuttal evidence or cross-examination, but when the facts are legislative, that is a matter of convenience and not of procedural right”.

b. Participation by Competitors in Certificate Proceedings Is a Normal and Well-Recognized Procedure

The rules of procedure which the PUC and the ICC have established pursuant to the California Public Utili-

ties Code and the Interstate Commerce Act, respectively, in certification proceedings fully recognize the need by the agency to receive a free flow of information from protestants as well as applicants.

First as to the PUC its rules require an applicant for a certificate to notify potential competitors (Rule 21). Such competitors may intervene and participate as parties, offering evidence and engaging in cross-examination (Rules 53-57), and may file briefs (Rule 75), and present oral argument (Rule 76). The Public Utilities Code Sections 1731-1736 permit any party to seek rehearing before the PUC, and to seek court review. The PUC's rules give the hearing officer ample power to restrict presentation and cross-examination by intervening parties and to prohibit intervention unless the petitioner can demonstrate a legitimate interest (Rule 63).

Next as to the ICC, the Interstate Commerce Act and the Interstate Commerce Commission's Rules of Procedure similarly provide for notice of certificate proceedings through publication in the Federal Register, and the right of potential competitors to protest and participate in hearings. 49 C.F.R. Sections 1100.39, 1100.40, 1100.74. The rules specifically contemplate that protests may be withdrawn after amendment of an application (49 C.F.R. Section 1100.247(d)(5)):

“Where a person has a limited interest in an application, which possibly could be eliminated by a restrictive amendment to the application, which amendment must be acceptable to the Commission, it may also include in a protest filed in conformity with this paragraph an offer to withdraw the protest in

the event of acceptance by applicant and the Commission of such amendment”.

The ICC hearing officer has ample power to restrict the issues and to limit or exclude evidence offered by protesting carriers (49 C.F.R. Section 1100.76). Protesting carriers, as other parties, may file exceptions (Section 1100.96), seek rehearing or consideration (Section 1100.101), and seek judicial review before a three-judge federal court, 28 U.S.C. §§ 1336, 1398.

The statutes and rules pertaining to the California PUC and the ICC demonstrate beyond any doubt that each of those agencies, while encouraging a free flow of reliable information by persons with a competitive interest, have at the same time very comprehensive powers to eliminate delays, obstructions, harassments, or machinery-clogging.

The activities complained of in the complaint merely fall within the normal and regular scope of protests in certificate proceedings before the PUC, the ICC and the courts.

c. Protest Activities Before the PUC and ICC and Courts in Certificate Proceedings Are “Political Activity” Within the Meaning of Noerr

A case of great significance in establishing that the alleged acts of defendants fall within the definition of “political activity” in *Noerr* is *NAACP v. Button*, 371 U.S. 415 (1963). In the *Button* case, the Court was concerned with a Virginia statute which made unlawful (a) advising a person that his legal rights had been infringed and referring him to a particular group of attorneys for assistance and (b) knowingly rendering legal assistance

to the person thus referred. The court struck down that statute as a violation of the First Amendment, declaring that (371 US at 429-430):

“In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930’s, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practical avenue open to a minority to petition for redress of grievances.” (Emphasis added.)

The Court went on to cite the *Noerr* decision.

If litigation may be “. . . a form of political expression”, then clearly it is wrong to assert that all activity of a litigation character is excluded from the *Noerr* doctrine. That is what plaintiffs seek to do when they carve out of the *Noerr* doctrine all activity which might be described as “judicial” in nature, whether before an administrative tribunal or a court.

The Court in *Button* does imply that litigation to resolve private differences may not fall within the concept of “political activity,” and that such litigation may not be protected by *Noerr*:

“In the context of NAACP objectives, litigation is not a technique of resolving private differences . . .”.

Here, then, is the outer limit of the *Noerr-Pennington* doctrine. Litigation to resolve private differences is qualitatively different from litigation which is political, i.e., which is designed to influence a change in policy. Litigation to resolve private differences is merely an instrumentality for the enforcement of private property or contractual rights; litigation to influence policy is of the essence of representative government. And this must be true, whether the forum is executive, legislative, judicial, or administrative.

The alleged activities of defendants were efforts to influence a policy making or law making function of government, and thus within the meaning of "political activity". *Noerr*, 365 US at 137. This will become clear from the following considerations.

Under California law no highway common carrier can lawfully operate without obtaining a certificate from the California PUC "declaring that public convenience and necessity requires such operation". P.U. Code § 1063. Similarly, a motor common carrier transporting in interstate commerce may not lawfully operate without first obtaining from the ICC a certificate of public convenience and necessity. Interstate Commerce Act, § 207(a), 49 U.S.C. 307(a).*

*An exception applies to carriers possessing state certificates and operating wholly within a single state if such carriers registered their state rights with the ICC prior to October 15, 1962 and took advantage of the grandfathering provisions in the amendatory provisions which took effect on that date. An exception also applies under which, pursuant to such amendatory language, a state commission may grant interstate rights, which must be based, however, upon proof of public convenience and necessity, where a single state operator is simultaneously seeking from the state commission an intrastate right of like scope. Interstate Commerce Act, § 206(a)(1)-206(a)(7), 49 U.S.C. 306(a)(1)-306(a)(7).

The phrase, "public convenience and necessity", is not defined under either California or federal law. It is only a general guide. The California Legislature and the Congress have delegated to the PUC and ICC, respectively, the legislative function of giving it content and meaning.

In California the PUC has given "public convenience and necessity" different content at different times. Amongst the factors which it considers are (1) fitness and willingness of the applicant to perform the service, (2) adequacy of existing service, (3) the effect of additional certification upon carriers already in the field, (4) desirability of "regulated competition" as opposed to monopoly. Its determinations on public convenience and necessity unless wholly arbitrary, are final. The California Supreme Court has so indicated in the following cases: *Oro Elec. Corp. v. Railroad Comm.*, 169 Cal. 466, 471 (Cal. 1915); *L. A. Metropolitan Transit Authority v. Public Utilities Commission*, 52 Cal.2d 655, 659 (1959); *California Motor Transport Co. v. Public Utilities Commission*, 59 Cal.2d 270 (1963).

Thus, the California Public Utilities Commission is vested not only with the power to determine whether "public convenience and necessity" require the augmentation of competition in a particular transportation market, but even with the power to determine, within broad limits, the meaning of that statutory language. Beyond any doubt, the Commission in every operating rights case not only establishes an economic policy for a particular market, but does so according to a flexible standard which the legislature has never defined and which the courts have declined to construe. The California Supreme Court

has gone no further than to say, in the *California Motor Transport Company* case, *supra* (a case which was part of the alleged "conspiracy" herein), that the commission must state what factors it finds material to the public convenience and necessity standard, and make basic findings thereon.

Turning to "public convenience and necessity" under the Interstate Commerce Act, Congress in the Transportation Act of 1940 did give to the ICC some limited guidance when it enacted the "National Transportation Policy", 49 USC preceding Section 1:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of [the Interstate Commerce Act] shall be administered and enforced with a view to carrying out the above declaration of policy."

Subject to this very limited guidance, the ICC must give content to “public convenience and necessity” according to its own views, so there is an enormous area of discretionary policy making.

The federal courts, like the California Supreme Court, have not interfered with the ICC’s determination of public convenience and necessity so long as the decision is based upon rational findings and conclusions. As the Supreme Court said in *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156 (1962) “expert discretion is the lifeblood of the administrative process” and decisions of the ICC granting or denying certificates of public convenience and necessity will not be disturbed provided there is a rational basis, adequately set forth, for the decision.

The standards imposed upon the PUC and ICC in granting or denying applications to purchase or sell operating authorities, are if anything, even vaguer than “public convenience and necessity”.

Section 851 of the California Public Utilities Code, which governs the purchase and sale of operating rights, contains no standard whatsoever. In other words, the constitutional and legislative mandate is simply that transfers of operating rights be permitted only if they are consistent with the public interest, as that interest is seen by the Commission.

Under Section 5(2) of the Interstate Commerce Act, the ICC is directed to approve the transfer of a certificate if it “. . . will be consistent with the public interest . . .” (Section 5(2)(b), 49 USC Section 5(2)(b).) Where the

carrier is in the category covered by Section 212 of the Interstate Commerce Act, no standards whatsoever have been imposed by Congress. Section 212(b) provides simply that "except as provided in Section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe." See also, the general standards for temporary operating authorities, and for the operation under lease of another carrier's operating authorities, contained in Interstate Commerce Act, Section 212(a), 49 USC 310(a).

It is obvious from the foregoing that under the powers delegated to the PUC and ICC, those bodies do in fact exercise a great deal of authority in the area of governmental policy and lawmaking. While their decisions may most immediately affect individual carriers, their decisions must necessarily be based upon the formulation of governmental policy which reaches a large segment of the economy. The question before an agency in a certificate case is, how will the public be affected if the number of competitors in the market is increased. Will the service improve or deteriorate? Will costs, and therefore rates charged to the public, go up or down? In short, what economic policy, what degree of competition, will most benefit the shippers and receivers of freight? That question is "legislative" not in the sense that the Legislature, as constituted, can efficiently answer it, but in the fundamental sense that it is a policy making and law-making function, where the dialogue between the people and the administrators is as worthy of protection as any dialogue between the people and their legislators or executives. This process in no way resembles a "... technique

of resolving private differences''. *NAACP v. Button*, *supra*, 371 U.S. at 429.

The fact that the PUC and ICC obtain information through quasi-judicial procedures obviously does not affect the foregoing conclusions. When an agency gathers the facts through such procedures, it is simply employing one of several effective methods of educating itself. Indeed, legislatures themselves, particularly in recent years, have used many of the same procedures in the preparation of committee and subcommittee reports. The method of fact-gathering varies according to the type of information which is needed, and this is true whether the fact-gathering body is a legislature, an executive, or an administrative agency.

Plaintiffs devote a great deal of discussion to Judge Friendly's article referred to earlier (*The Federal Administrative Agencies*, etc., 75 Harv.L.Rev. 863 (1962)). The burden of his article is that agencies should develop and publicize standards for the resolution of the complex decisions which they make. These decisions are non-legislative in the sense that the Legislature could not resolve them through its ordinary processes or within its regular organizational framework. But nothing in the Judge's article suggests that the administrative agencies, whether in certification cases or in any other kind of proceeding, do not make policy or do not in fact make laws.

It must be concluded that the alleged activities of defendants before the PUC and ICC, and before the courts in conjunction therewith, constitute "political activity" within the meaning of *Noerr* and are beyond the reach of the antitrust laws.

3. The Patent Cases Relied on by Plaintiffs Are Not Pertinent

It was intimated in *NAACP v. Button, supra*, that litigation for the purpose of resolving private differences might fall outside the concept of "political activity" and therefore not be immune to the antitrust laws. The patent cases relied upon by plaintiffs fit this description. A patent is a private property right consisting of a right by the holder to exclude all others from making, using, or selling a device which incorporates the idea covered by the patent. 35 U.S.C. §§ 154, 261. The right to exclude is absolute, and though created by the Legislature, is a private right which may be bought, sold, licensed, leased, assigned, or shared with others through the execution of private contract. No governmental authorization (other than recording) is required to legitimate any such transaction in patent rights. No governmental agency or official has any power to dilute the economic value of a patent by issuing another patent for the same idea to anyone other than the original patent holder. No governmental agency or official has any power to cancel a patent. The policy-making function of government was exhausted when Congress enacted the Patent Laws. The Patent Office has no discretion to refuse the issuance of a patent, if the idea or device is unique. If a competitor files an interference in a patent case, claiming that his previously issued or pending patent covers the same idea or device, the Patent Office must make a decision. However, the Patent Office has no discretion in making that decision, nor may the Patent Office consider any factors other than the claims which are made for the respective patents, and the nature of the ideas or devices involved. Only Con-

gress by amending the Patent Laws, can exercise any discretion in determining the degree to which the competition will be restricted for the purpose of encouraging the inventive arts.

Thus when a patent holder goes to court and files an infringement action, he calls upon that same function of government which a landowner invokes when he seeks to enjoin a trespass on his property. The Court is not concerned as to the wisdom of granting to the patent holder the absolute right to exclude others from his private property. That is a decision which has been made by Congress. The only question is, has there been any infringement? The public interest, as that interest might be construed by the Court, has nothing to do with the outcome of the case. The litigation on patent rights is, therefore, totally apolitical.

It may be argued that this is not always the case. Indeed, the *Button* decision, and many other decisions, particularly in the area of civil rights, have shown that litigation of ostensibly private property rights may indeed be political. The right of private owners to exclude others from their property must bow to other rights, such as the right of any person to use of the facilities of a public innkeeper, and the right of persons under the Equal Protection clause of the Fourteenth Amendment to the equal use of publicly-owned facilities. When one policy must be weighed against another, in the light of the public interest, that litigation becomes "political". But no such question is presented in a patent infringement suit.

For the reasons stated, it is clear that patent enforcement falls into the category of "private litigation" and is therefore in a very different category from proceedings involving certification. A certificate of public convenience and necessity is not a property right at all. It is a license to operate within a given area, and the licensing agency is free to give as many identical rights as it believes justified under the governmental policy committed to its care. It is nothing more than a right to do business, subject to many conditions, and it carries with it no right to exclude any other competitor from the field. The essence of the certificate granting authority is that it shall be exercised only when required by the public interest. The proceedings are therefore part of the political process, thus making the *Noerr* doctrine applicable.

Because of the vital distinction noted there is no reason to analyze in detail the various patent-antitrust cases cited by plaintiffs. It is enough to note that the Court below held the patent cases irrelevant on the ground that in none of them did the Court hold or say that mere association for the bringing or threatening of a patent infringement suit—*without more*—is, itself, an antitrust violation, merely because the associates may contemplate injury to a competitor.

D. The "Sham" Exception in *Noerr* Does Not Apply

The Supreme Court in *Noerr* stated that there may be situations in which a campaign "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt

to interfere directly with the business relationship of a competitor and the application of the Sherman Act would be justified”.

In that case a finding of fact was accepted that the conspirators’ sole purpose was to destroy the truckers as competitors and to hurt them in every way possible, including to destroy their good will, even though they, the conspirators, might have no success in influencing legislation.

Such intent was found insufficient to constitute the activities of the defendants as “sham” as the Court used that term. The Court stated that, if the complaint was to be believed, the effort of defendants was not only genuine but highly successful.

The present complaint is not unlike the *Noerr* complaint in this respect. There is no allegation that defendants did not genuinely try to influence the PUC, the ICC, and the courts. As previously noted, the plaintiffs admit in their brief at page 8, that defendants, in appearing before the PUC, the ICC, and the courts, made “the best case the facts would permit”. The court below noted that plaintiffs in their brief before that court submitted an exhibit showing that 21 out of 40 matters which had reached the decision stage resulted in action wholly or partly favorable to defendants.

Plaintiffs obviously tried to make allegations which would fit within the “sham” exception when they filed their First Amended Complaint. However, they could not truthfully make the kind of assertions which would have accomplished that result. They simply made the ambiguous allegation that the protests were filed “with or with-

cut probable cause, and regardless of the merits of the case''. Along with that allegation, plaintiffs found themselves compelled to admit in their pleadings that defendants were successful in persuading the agencies to deny some of plaintiffs' applications or to grant some only in part. Plaintiffs also made the remarkable allegation that those decisions in which defendants were wholly or partly successful "... would not have been rendered adverse to plaintiffs and other competitors of defendants, because no opposition would otherwise have been commenced''.

Plaintiffs also alleged that defendants were successful in persuading the PUC to alter its policies with respect to the granting of certificates, so that after 1961 certificates were not as freely given as before.

Thus, from the pleadings in the Complaint itself, it is established that defendants' protests before the agencies and in the courts were in fact made with probable cause and cannot be characterized as "sham". This was recognized by the lower court when it stated, in the Memorandum of Decision (R. 56-57):

"However, the First Amended Complaint does not allege that all or any of the oppositions mentioned in the pleading were filed or were to be filed without probable cause. The pleading carefully refrains from charging that the oppositions were false, misleading to the agency or lacking in factual allegation and legal theory arguably relevant to the function of the regulatory agency in determining public convenience and necessity. The allegation is merely that defendants combined to file them 'with or without probable cause'. This allegation falls far short of charging that the oppositions would not be upon probable

cause. On the contrary, it implied that all or at least some of the oppositions may have been filed *with* probable cause. [Emphasis in original.]

“Nor does the First Amended Complaint allege that all or any of the applications made by plaintiffs (which defendants oppose) were meritorious under the applicable regulatory acts. The allegation carefully refrains from alleging that they were. Plaintiffs merely allege that defendants combined to oppose their applications ‘regardless of the merits of’ the applications. This falls short of alleging that the applications were meritorious. On the contrary, it implies that all or at least some might be without merit.”

The public records of the PUC and ICC would demonstrate that with two exceptions (Garden City Transportation Co., Ltd. and Callison Truck Lines, Inc. operated solely in Northern California), each of the defendants was individually, or together with an affiliated defendant, certificated to provide transportation over California highways between all major commercially significant points. Thus, any application for new, transferred, or registered operating authority filed by any plaintiff would necessarily involve increased competition to virtually all of the defendants. Each defendant thus had competitive standing individually to protest any of the applications which are the subject of this complaint. And certainly in every case, with a large number of certificated carriers already operating in the market (there are seventeen named defendants, counting the two Ringsby companies as one, and counting Oregon-Nevada-California Fast Freight and Southern California Freight Lines as

one), it could not be said that there was no probable cause to believe that protestants might be able to persuade the agency that “public convenience and necessity” did not require the addition of another competitor. A glance at any one of the dozens of application proceedings which are the subject of this case will show that the agencies consider a profusion of economic and statistical evidence before deciding whether or not to grant authority to a new competitor.

To summarize, there is really no issue of “sham” or lack of probable cause in this case, for two reasons. First, as the District Court held, there has been no proper allegation of sham or lack of probable cause. Second, there could not be as a matter of fact any sham or lack of probable cause, where with but insignificant exceptions all of the defendants at all relevant times were, with each application filed, faced with additional highway common carrier competition, and it cannot be said that defendants did not hope and expect to achieve success in a significant number of cases.

E. Economic Harm to Plaintiffs Resulting from Defendants' Alleged Activities Does Not Make the Noerr Doctrine Inapplicable

The mere fact that the alleged activities of defendants might have caused incidental injury to the plaintiffs, independently of the results of action by the PUC, the ICC, or the courts, does not destroy the immunity of *Noerr*. Thus, in *Noerr* it was said (365 U.S. 143):

“... the findings of the District Court that the railroads' campaign was intended to and did in fact injure the truckers in their relationships with the public and with their customers can mean no more than that the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action and that the railroads were hopeful that this might happen. . . . It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing such campaigns. We have already discussed the reasons which have led us to the conclusion that this has not been done by anything in the Sherman Act.”

Since plaintiffs' only other allegation of injury is based upon alleged harm coming from adverse decisions of the PUC, the ICC and the courts, it has failed to allege *any* activities upon which damages could be recovered. Damages cannot be based upon orders of governmental bodies. *Parker v. Brown*, 317 U.S. 341 (1943).

CONCLUSION

For all of the reasons stated herein, it is respectfully submitted that the District Court's Order Dismissing Appellant's First Amended Complaint be sustained.

Dated, San Francisco, California,
December 13, 1968.

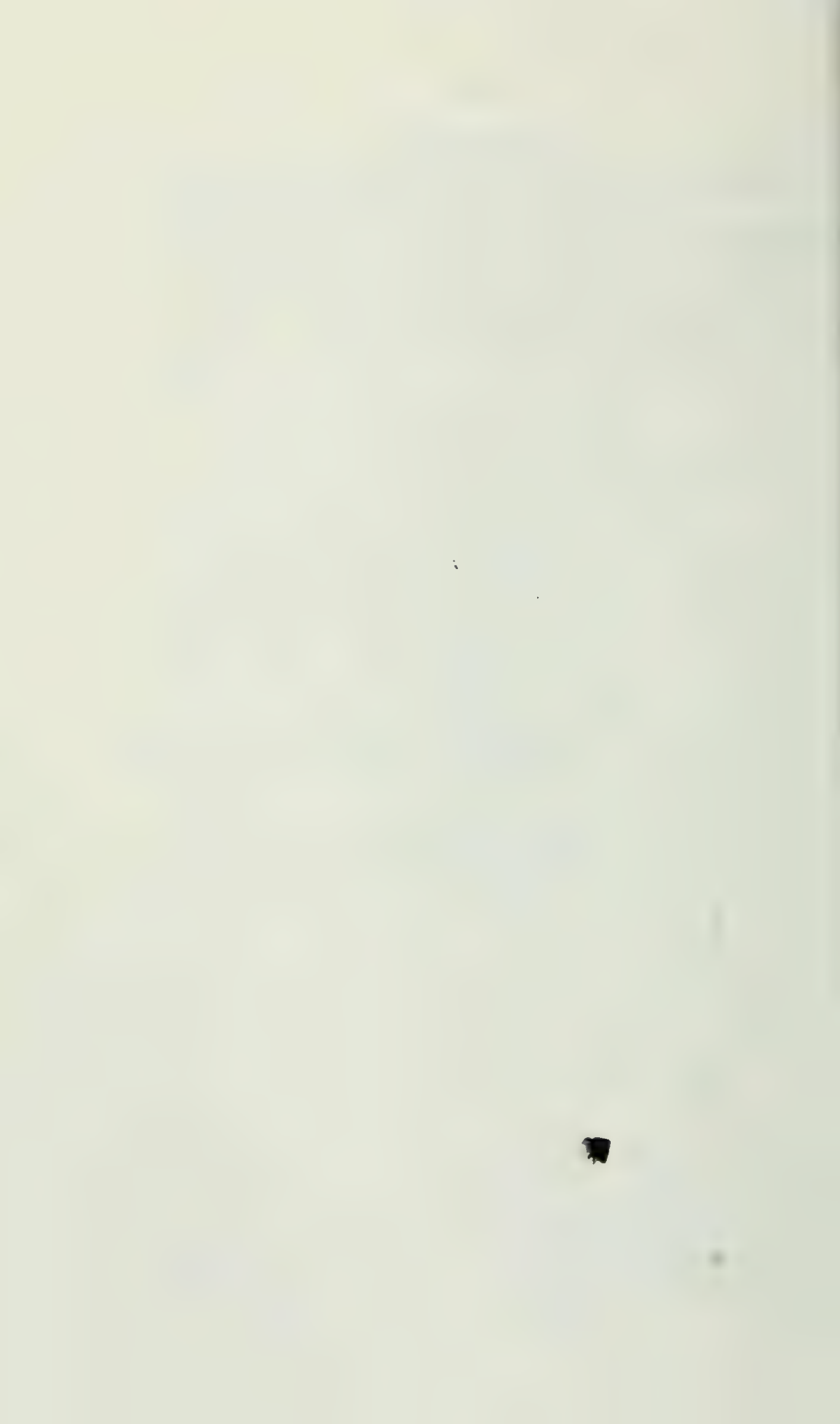
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101-12-000

No. 22,462

IN THE

**United States Court of Appeals
For the Ninth Circuit**

| | |
|---------------------------------|--------------------|
| TRUCKING, UNLIMITED, et al., | } |
| vs. | |
| CALIFORNIA MOTOR TRANSPORT CO., | |
| et al., | |
| | <i>Appellants,</i> |
| | <i>Appellees.</i> |

**On Appeal from the United States District Court
for the Northern District of California**

BRIEF FOR APPELLANTS

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NORTHERN DISTRICT OF CALIFORNIA

Subject Index

| | Page |
|--|------|
| Jurisdictional statement | 1 |
| Statement of the case | 3 |
| Appellants | 3 |
| Appellees | 3 |
| The complaint and the facts | 3 |
| 1. The formation and purpose of the conspiracy | 3 |
| 2. Economic and regulatory considerations underlying the conspiracy | 9 |
| a. Appellees' combined power constitutes monopoly power | 9 |
| b. Essential role of certificates of public convenience and necessity, their registration and transfer | 9 |
| c. P.U.C., I.C.C. and courts are the exclusive agencies through which certificates, their registration and transfer can be secured | 12 |
| d. Only the judicial function of the P.U.C. and I.C.C. is in question in this case | 12 |
| 3. Implementation of the conspiracy | 13 |
| a. Protests | 13 |
| b. Financing | 14 |
| c. Publicity | 14 |
| 4. Achievement of aims | 15 |
| Specification of errors | 16 |
| Questions presented | 17 |
| Summary of argument | 17 |
| Argument | 20 |
| I. Misuses of the judicial processes of the courts and regulatory commissions for antitrust purposes are pro- hibited by the Sherman Act | 20 |
| A. The Noerr and Pennington decisions protect po- litical activity, not judicial activity, from the Sherman Act | 20 |

| | Page |
|---|------|
| B. The patent-antitrust cases and other judicial abuse cases show that appellees' misuses of judicial process are subject to the antitrust laws | 25 |
| C. A misuse of the judicial processes of the commissions is indistinguishable from misuses of the courts. Both activities alike are prohibited by the antitrust laws | 34 |
| D. The court below misconstrued the scope and meaning of the patent-antitrust cases in failing to apply them to the case at bar | 43 |
| E. The Sherman Act prohibits all unreasonable restraints of trade in the absence of specific exemptions from the act. Nothing in the rationale of Noerr-Pennington, Parker v. Brown, the First Amendment or other law exempts appellees' activities from the antitrust laws | 48 |
| II. Noerr protection from the Sherman Act does not extend to activity ostensibly intending to induce government action, but actually effecting a direct restraint upon competitors | 65 |
| III. Appellees' restraints upon appellants' access to judicial hearings constitute abridgements of the First, Fifth, and Fourteenth Amendments to the Constitution. Such abridgements support a finding of antitrust violations as well | 73 |
| Conclusion | 79 |

Table of Citations

| Cases | Pages |
|---|----------------|
| Allegheny County v. Frank Mashuda Co., 360 U.S. 185 (1959) | 62 |
| Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) | 48 |
| Atlantic Heel Co. v. Allied Heel Co., 284 F.2d 879 (1st Cir. 1960) | 79 |
| Baker v. Carr, 369 U.S. 186 (1962) | 52 |
| Bridges v. California, 314 U.S. 252 (1941) | 63 |
| Clapper v. Original Tractor Cab Co., 270 F.2d 616 (7th Cir. 1959) | 26, 33 |
| Conneau v. Geis, 73 Cal. 176 (1887) | 74 |
| Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) | passim |
| Fletcher v. Peck, 6 Cranch 87 (1810) | 52 |
| Food Machinery and Chemical Corp. v. Walker Process Equipment, Inc., 335 F.2d 315 (7th Cir. 1964) | 78 |
| Freeman v. Maryland, 380 U.S. 51 (1965) | 63 |
| In Re Stolen, 193 Wis. 602, 216 N.W. 127 (1927) | 60, 61, 62 |
| Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir. 1952) | 26, 29, 30, 31 |
| Lynch v. Magnavox Co., 94 F.2d 883 (9th Cir. 1938) | 26, 27, 28, 29 |
| Marnell v. United Parcel Service of America, Inc., 260 F. Supp. 391 (N.D. Cal. 1966) | 55 |
| Marsh v. Alabama, 326 U.S. 501 (1946) | 75 |
| Melvin v. Pence, 130 F.2d 423 (D.C. Cir. 1942) | 34, 35 |
| National Surety Co. v. Page, 58 F.2d 145 (4th Cir. 1932) .. | 35 |
| Northeast Airlines, Inc. v. World Airways, Inc., 1967 Trade Cas., page 83,971 (D. Mass. 1966) | 78, 79 |
| Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958) | 48 |

| | Pages |
|--|--------------------------------|
| Pacific Tel. and Tel. Co. v. Eshleman, 166 Cal. 640 (1913) | 36 |
| Parker v. Brown, 317 U.S. 341 (1943) | |
|18, 19, 48, 49, 52, 53, 54, 55, 56, 66, 69 | 69 |
| Pennekamp v. Florida, 328 U.S. 331 (1946) | 63 |
| Pub. Util. Comm'n v. Pollack, 343 U.S. 451 (1952) | 77 |
| Railroad Comm'n of California v. Pacific Gas and Electric Co., 302 U.S. 388 (1938) | 74 |
| Rangen, Inc. v. Sterling Nelson & Sons, Inc., 351 F.2d 851 (9th Cir. 1965) | 78 |
| Saunders v. Shaw, 244 U.S. 317 (1917) | 62 |
| Sheppard v. Maxwell, 384 U.S. 333 (1966) | 63, 64 |
| Smith v. Allwright, 321 U.S. 649 (1944) | 75 |
| Stewart-Warner Corp. v. Staley, 42 F.Supp. 140 (W.D. Pa. 1941) | 26, 33 |
| Terry v. Adams, 345 U.S. 461 (1953) | 75 |
| Thomas v. Collins, 323 U.S. 516 (1945) | 62 |
| Trucking Unlimited v. California Motor Transp. Co., 1967 Trade Cas., page 84,739 (N.D. Cal. 1967) | 17, 43, 45, 48 |
| United Mine Workers v. Illinois State Bar, U.S., 19 L.Ed.2d 426 (1967) | 74, 76, 77 |
| United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) | passim |
| United States v. Cruikshank, 92 U.S. 551 (1876) | 60 |
| United States v. Frankfort Distillers, Inc., 324 U.S. 293 (1945) | 48 |
| United States v. Guest, 383 U.S. 745 (1966) | 76 |
| United States v. Hartford Empire Co., 46 F.Supp. 541 (N.D. Ohio 1942), aff'd, 323 U.S. 386 (1944) | 26, 32, 33 |
| United States v. Hutcheson, 312 U.S. 219 (1941) | 48 |
| United States v. Krasnov, 143 F.Supp. 184 (E.D. Pa. 1956) | 26, 31, 32 |
| United States v. Lester, 363 F.2d 68 (6th Cir. 1966) | 76 |
| United States v. Line Material Co., 333 U.S. 287 (1948) ... | 48 |
| United States v. Singer Mfg. Co., 374 U.S. 174 (1963) | 26, 27, 29, 33, 34, 43, 45, 50 |
| United States v. Union Pacific R.R. Co., 226 U.S. 61 (1912) | 48 |

TABLE OF CITATIONS

v

| | Pages |
|---|--------|
| Wilkinson v. United States, 365 U.S. 399 (1961)..... | 59 |
| Woods Exploration and Producing Co., Inc. v. Aluminum Company of America, 36 F.R.D. 107 (S.D. Tex., 1963) .. | 67, 68 |
| Yick Wo v. Hopkins, 118 U.S. 356 (1886)..... | 74 |
| Zorach v. Clausen, 343 U.S. 306 (1952)..... | 52 |

Constitutions

United States Constitution:

| | |
|---------------------|--|
| Amendment I | 18, 19, 48, 58, 59, 64, 65, 66, 73, 74, 75, 77 |
| Amendment V | 73, 74 |
| Amendment XIV | 73, 74, 75 |

Codes

Public Utilities Code:

| | |
|-----------------------------|----|
| Sections 1061, et seq. | 10 |
| Section 1069 | 12 |
| Sections 1701-1795 | 13 |

Rules

| | |
|---|----|
| Order Revising Rules of Practice and Procedure, California Public Utilities Comm'n Cases 4924 and 7234, Division No. 72329 (effective July 14, 1967)..... | 13 |
|---|----|

Federal Rules of Civil Procedure:

| | |
|---------------------|---|
| Rule 12(b)(1) | 2 |
| Rule 12(b)(6) | 2 |
| Rule 23 | 2 |
| Rule 74 | 2 |

Interstate Com. Comm'n, Code of Ethics for Practitioners (49 U.S.C. Appendix A):

| | |
|--------------|----|
| Rule 2 | 39 |
| Rule 8 | 39 |

| | |
|--|----|
| Rules of Procedure of California P.U.C., Articles 1, 2, 4, 5, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 | 13 |
|--|----|

| Statutes | Pages |
|---|--------------|
| California Public Utilities Act of 1911 | 36 |
| 15 U.S.C., Sections 1, 2 (Sherman Act)..... | passim |
| 28 U.S.C., Section 1291 | 2 |
| 49 U.S.C., Section 306(a)(7) | 11 |

Texts

| | |
|---|------------|
| Friendly, Judge Henry J., "The Federal Administrative Agencies: The Need for Better Definition of Standards", 75 Harv. L. Rev. 863 (1962)..... | 40, 41, 42 |
| McKeage, Everett C., <i>Public Utility Regulatory Law</i> (1956) : | |
| Page 84 | 38 |
| Pages 84-85 | 39 |
| Pages 106-107 | 39 |
| IV Toulmin's Anti-Trust Laws 572 (1950)..... | 46 |

Miscellaneous

| | |
|--|----|
| Application of American Transfer Co., Cal.Pub.Util. Comm'n App. No. 43207, Decision No. 63024 (Jan. 1, 1962)..... | 10 |
|--|----|

No. 22,462

IN THE

**United States Court of Appeals
For the Ninth Circuit**

TRUCKING, UNLIMITED, et al.,

Appellants,

vs.

CALIFORNIA MOTOR TRANSPORT Co.,

et al.,

Appellees.

**On Appeal from the United States District Court
for the Northern District of California**

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from an order entered October 6, 1967 by the U.S. District Court for the Northern District of California dismissing appellants' first amended complaint for injunctive relief and damages arising out of an alleged violation of §§ 1 and 2 of the Sherman Act, 15 USC §§ 1 and 2.

This action was instituted by appellants on May 6, 1966. Appellants are 14 highway common carriers suing on behalf of themselves and as representatives of a class of similarly situated carriers. Appellants filed the first amended complaint, pursuant to stipula-

tion of the parties and order of the District Court, on February 20, 1967. Appellees made motions to dismiss the first amended complaint upon two separate grounds: (1) failure to state a claim upon which relief can be granted (Rule 12(b)(6) FRCP), and (2) lack of jurisdiction in the District Court (Rule 12(b)(1) FRCP). Only the motion to dismiss for failure to state a claim was considered by the District Court judge in dismissing this action. The motion to dismiss for lack of jurisdiction was not considered below, as made clear by letter of October 25, 1967 (R. 68) written by District Judge William T. Sweigert, Jr., at the request of appellants' counsel. No motions were made respecting the maintenance of the action as a class action under Rule 23 of the Federal Rules of Civil Procedure and that question is not now in issue.

On October 6, 1967 the District Court entered an order dismissing appellants' first amended complaint. The court's order denied leave to appellants to amend further unless appellants moved to amend within 15 days of the entry of the order. Appellants did not so move and the order of dismissal became final on October 21, 1967. Subsequently, on November 1, 1967, appellants' notice of appeal was filed. The appeal was timely. (Rule 74 FRCP.) This court has jurisdiction by virtue of 28 USC § 1291.

STATEMENT OF THE CASE

Appellants

Appellants (plaintiffs below) are highway motor common carriers operating under certificates of public convenience and necessity granted by the California Public Utilities Commission (hereafter "P.U.C.") (R. 3) and the Interstate Commerce Commission (hereafter "I.C.C.") (R. 4). Each appellant is an independent company, separate from the other appellants. Appellants compete for business with one another or with the appellees depending upon the location and nature of shippers and the area of operation of each. The business of appellants is the transportation of goods and packages throughout California and the western United States. (R. 4.)

Appellees

Appellees (defendants below) are likewise highway motor common carriers operating under certificates of public convenience and necessity granted by the P.U.C. and I.C.C. The nature of the appellees' business is the same as that of appellants. (R. 4.) Appellees are the largest common carriers in California and the West. (R. 6.) They have monopoly power when they act in combination. (R. 12.)

The Complaint and the Facts

1. The Formation and Purpose of the Conspiracy

This action was filed May 6, 1966. The first amended complaint asserts two counts, both for conspiracy and monopolization as set forth above. The first count

charges an agreement to destroy and weaken competitors; the second more specifically alleges a conspiracy to block appellants' access to regulatory bodies and courts, to deprive them of fair hearings and, in effect, to substitute appellees for the P.U.C., the I.C.C. and the courts as the regulators of appellants and other carriers. Appellants claim that appellees have violated §§ 1 and 2 of the Sherman Act with respect to truck transportation of goods and packages (R. 5) with resulting damage to appellants. The charge is that appellees have combined and conspired to restrain and monopolize, have monopolized and are attempting to monopolize the business of such truck transportation (R. 5).

For many years prior to February of 1961 and continuing uninterrupted to the date of filing of this action, the California P.U.C. had formulated a policy that competition was to be encouraged among carriers. The P.U.C. accordingly announced this policy to the trucking industry and further announced that, in order to implement the policy, certificates of public convenience and necessity would be liberally granted and their transfers likewise liberally approved. Announcements to the industry were clear and unequivocal. They were made frequently in P.U.C. publications as well as in formal decisions of the P.U.C. granting such certificates. (R. 14.) This policy has not changed and is today still the announced position of the P.U.C. However, it is not being carried out because appellees have supervened the P.U.C. policy and have substituted their own. (R. 15.)

Until February 1961, all carriers, including appellees and some appellants, who desired operating rights or transfers of operating rights took advantage of the P.U.C.'s liberal program. Applications were granted as a matter of course. Because of this announced policy, opposition was rarely encountered. The few protests which were made were asserted by one or only a few carriers directly affected by the application. (R. 14.)

In February 1961, appellees met and discussed methods by which they could eliminate or weaken their competitors. It was their belief that there was too much competition from smaller carriers who had easy access to operating rights which were competitive to appellees. They felt an urgent need to lessen competition because it was having an adverse affect upon their receipts. They met to do something about it. (R. 6, 14.)

The initial meeting was held in a hotel in Coronado, California in February 1961. The sole purpose of the meeting was to explore methods and agree upon means to destroy and restrain competition. (R. 6, 14.) Appellees discussed techniques for lobbying the California P.U.C. and other agencies having control over operating rights. They discussed a program of filing protests and other adversary proceedings in the agencies and courts against appellants' applications for operating rights in order to deter to the point of preclusion the filing of any further applications by competitors. Appellees chose to rely upon the latter method as the means for eliminating and controlling competition. (R. 6, 14.)

Appellees agreed first to make known to the industry in unmistakably clear terms that any application for certificated rights or transfers then on file or thereafter to be filed would be met with a formal protest by appellees as a group. They agreed that the deterrent effect would be greatest if all competing truckers knew with certainty that each protest would be pursued to the last and highest forum available to hear and determine them and that each available intermediary procedure would be fully exhausted if appellees lost their protests at the level below. (R. 9, 10.) They agreed that their deterrent power over all other carriers would be immeasurably heightened if all of them knew to a certainty that each appellee was committed to the other by agreement to share in financing every protest regardless of the geographical area affected by the proposed application, and regardless of whether the protestant competed with or would compete with the proposed applicant. (R. 6, 9.)

Appellees also agreed that the discouraging effect which they sought to achieve upon potential applications would best be served if all other carriers knew that protests would not be limited to those cases where protest might have merit, but that every application,¹ irrespective of its merits, would be protested. (R. 8.) They further agreed that they would most effectively carry out their program of deterrence if every carrier knew that filing of applications would invariably involve great or prohibitive expenditures of time and

¹Appellees' agreement excepted insignificant applications such as those seeking rights in local drayage areas (R. 7).

money and cause long and prohibitive delay in the granting of rights should a carrier decide to file an application. (R. 10.)

At their February 1961 meeting, appellees also agreed that for the same reasons truckers would be deterred by appellees' actions from seeking new rights or extensions of rights, truckers who already had applications on file would also choose to abandon them or settle with appellees for lesser rights in consideration of appellees' withdrawal of their protests. (R. 10, 11.)

Appellees further agreed that their plan of deterrence would have its maximum impact on other carriers if appellees, both by word and deed, gave credibility to their plan. Accordingly, they agreed to spread the word or publicize their intended plan of action to members of the trucking industry. This was done by word of mouth at casual encounters, small meetings, and conventions of truckers. In order to prove their plan of action, immediately after their meeting in February 1961, appellees filed protests in every then pending application or transfer proceeding, except those involving local drayage areas and the REA express companies.² This pattern of protests has persisted without interruption from February 1961 to the present. (R. 6-8.)

The machinery and facilities of the P.U.C., the I.C.C. and courts by appellees were the means they chose to eliminate and restrain competition. They used

²Appellants are informed that of approximately 60 applications pending in February 1961, 53 protests were filed. Of the 7 remaining, 5 involved local drayage area rights and 1 REA application. One common carrier application was not protested.

the machinery and facilities of the agencies and courts because they were an integral part of the regulatory scheme from which appellees were seeking to exclude competitors. Their conspiracy was not one to use such facilities and machinery to convince the agencies and courts that applicants were "wrong" and appellees were "right" on the merits of the applications made. Their conspiracy was to use such machinery and facilities in such a manner as to deter all truckers from filing applications. (R. 11, 12.)

We do not argue here that once appellees became involved in protests and found themselves within the procedural forum of the agencies and courts they failed to make the best case the facts would permit. On the contrary, this aspect of their activity was perhaps the sole legitimate part of their entire scheme. However, they were not there to protest, as such. They were there to close the door to operating rights for other carriers, to protest—not necessarily to win, although to win was always desirable—in order to set an example, to discipline other carriers, to intimidate them, to implement their own "non-liberal" policy and to create an oligopoly in themselves. Appellees neither agreed to nor did they seek mainly to induce government to act or to petition government to favor them. They sought to prevent appellants from having access to the only source of their business existence by acts aimed directly at competitors. (R. 15.)

Any certificate issued by the P.U.C. could automatically be registered with the I.C.C. prior to 1963.

The policy behind registration was to avoid two hearings on the public convenience and necessity of an applicant's request, one before the P.U.C. and another before the I.C.C. In such a case, no hearing or other method of protest was available in the I.C.C.; therefore, I.C.C. registrations could not be the object of appellees combination. In 1963, however, the I.C.C. adopted procedures which required applications for registration and protests, if desired, by persons opposing such registrations. Following this change in procedure, applications for registrations were protested by appellees pursuant to their conspiracy.

2. Economic and Regulatory Considerations Underlying the Conspiracy

Underlying the decision of appellees to embark upon their course of action were the following economic and regulatory considerations:

a. Appellees' Combined Power Constitutes Monopoly Power

The appellees are the largest common carriers in the West. (R. 6.) Combined, their power is immense and they are able to eliminate and limit competition, solely by reason of their massive economic and procedural cooperation. They have combined, thus acquiring the ability to do that which they could not do alone. (R. 12.)

b. Essential Role of Certificates of Public Convenience and Necessity, Their Registration and Transfer

This case involves common carriers. A trucker cannot become a common carrier without a certificate of public convenience and necessity, and a common carrier cannot expand its territory without such a cer-

tificate authorizing it. A common carrier cannot move its trucks without such specific authorization. A certificate of public convenience and necessity is a grant of a partial monopoly by the state to a business enterprise authorizing it to do business as described. California Public Utilities Code § 1061 et seq.

In certificates of public convenience and necessity issued by the California P.U.C., a provision similar to the following has normally been inserted:

“Aside from their purely permissive aspect, such rights extend to the holder a full or partial monopoly of a class of business over a particular route. This monopoly feature may be modified or cancelled at any time by the State, which is not in any respect limited as to the number of rights which may be given.”

Application of American Transfer Co., Cal.
PUC App. No. 43207, Decision No. 63024
(Jan. 1, 1962).

A certificate gives a carrier its business status and financial interest in the activities of the P.U.C. and I.C.C. in granting certificates to competing or potentially competing carriers. Without the need for certificates, there would be no reason for appellees to interest themselves in such proceedings.

It is well known that business expansion has been unprecedented in California and the West. Businesses have expanded their sites and have established branches throughout the area. New businesses and established eastern companies have entered the western markets. Transportation of goods and packages

between the populous centers and the more remote areas increases as such remote areas become more urbanized. The volume of traffic between existing points continually expands.

The role of highway common carriers in the expanding economy of the West is unprecedented. Rights to operate trucks on regular routes between fixed points are not only important but essential to the conduct of business. They are, in economic effect, one and the same. By registering certificates with the I.C.C., common carriers are entitled to use the intrastate routes as part of their interstate operation. 49 USC § 306(a)(7).

It is routine for carriers to seek intrastate rights from the P.U.C. for the purpose of using them in their interstate operation. Interstate common carriers operating between California and adjacent states often seek to register such rights. Registration with the I.C.C. normally eliminates a double hearing and is authorized by federal statute.

Registration, like the certificate to be registered, is an important and valuable business right for the same reasons the certificate is valuable. Certificates are valuable not only because they can be the basis for a common carrier seeking to earn a profit, but also because they can be bought and sold, like any other valuable asset. Because of expanding business and industry in the West and the great role common carriers have had in it, a certificate which cannot be extended as markets expand is of much less value than one which readily can be. Furthermore, if it is

known by a carrier that it will be exceedingly difficult to transfer a certificate, he is, by that reason alone, effectively deterred from seeking a certificate or extension of it in the first instance. (R. 13, 15.)

c. P.U.C., I.C.C. and Courts Are the Exclusive Agencies Through Which Certificates, Their Registration and Transfer Can Be Secured

Motor carriers have no sources other than the P.U.C. and I.C.C. from which to obtain business rights. If carriers do not have full and free access to such agencies, these valuable rights will not be available to them even if they otherwise qualify according to regulatory standards. (R. 13, 15.)

d. Only the Judicial Function of the P.U.C. and I.C.C. Is in Question in This Case

Common carrier rights are obtained only by the filing of a formal verified application and a finding of public convenience and necessity. The proceedings are similar to court proceedings in the sense that they are adversary. In courts as well as in agencies, some proceedings are unopposed. However, in all cases in which opposition occurs, the proceedings are adversary proceedings and the issues are adjudicated.

Appellants' attack is directed solely at appellees' uses of the adjudicative functions of the courts, the P.U.C. and the I.C.C. Such functions in the P.U.C. and I.C.C. are initiated by the filing of a formal verified application (P.U.C. section 1069) upon which a judicial hearing is held. Such functions are further characterized by the use of process, formal notices as regulated by statute, discovery (including the tak-

ing of depositions), use of subpoenas identical to the procedures employed by the Superior Courts in California, the taking of testimony under oath, findings of fact, conclusions of law, decisions and opinions, the use of precedent in the decisional process, the making of a record and the impermissibility of informal approaches to the hearing officers or commissioners concerning a case while it is under consideration. Calif. P.U. Code §§ 1701-1795; Rules of Procedure of Calif. P.U.C., Articles 1, 2, 4, 5, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20. See Order Revising Rules of Practice and Procedure, Cal. Pub. Util. Commn. Cases No. 4924 and 7234, Decision No. 72329 (effective July 14, 1967). The agencies involved here have myriads of functions other than the one characterized above as judicial. Appellants wish to make it clear, and believe it is clear from the first amended complaint, that no functions other than the judicial functions described are in question in this case. (R. 4, 5.)

3. Implementation of the Conspiracy

Appellees implemented their agreement as planned and fully achieved their aim. (R. 10-12.)

a. Protests

Opposition to applications was carried out by appellees as an unvarying pattern of protests at the Commission level. Appellants set every application for hearing before the appropriate Commission. If appellees lost at that level, they automatically appealed or filed other opposition to the grant of the application, terminating their opposition only when they were able

to force applicants to abandon or settle. Otherwise they proceeded through all levels to the courts of last resort. Their opposition to applications employed full scale and fully financed use of investigative techniques, procurement of witnesses, elaborate preparation and ample use of attorneys at each stage of such opposition proceedings. (R. 6-8.)

b. Financing

Pursuant to the plan, appellees financed their protests to applications by monthly contribution by each of them to cover expenses involved. Contributions were proportionate to each appellee's yearly income. (R. 6, 9.) Although appellees opposed application filed by any carrier, contributions were made by each appellee each month, regardless of whether particular applications then being protested had any competitive effect on each appellee. (R. 6, 9.)

c. Publicity

Beginning in February of 1961, the existence, purpose, and means of effectuating the agreement of appellees was deliberately disseminated to other truckers. Appellees publicized to the industry the fact that they would use their combined financial strength to protest all applications present and future, that opposition would be complete, unyielding and uncompromising, with no possible end in sight for applicants short of the forum of last resort. (R. 9, 10.) Appellees announced to the industry that it would be unwise and financially foolish for carriers to file applications and

that it would be wise for those who filed applications to terminate or abandon them or agree to settle on terms to the advantage of appellees. (R. 10.)

Dispersion of such information was directed neither to the public at large nor to the P.U.C., the I.C.C. or the courts. No agency or court participated in the formulating or implementation of appellees' agreement. The agreement was never approved.

4. Achievement of Aims

Appellees' aims were fully realized. Appellees' protests became procedurally engrafted upon all proceedings for certificates, their registration and transfer. (R. 10, 11.) The threat of undeviating opposition, the dissemination of the fact of their resolve to protest and the actual acts of protesting caused the filing of applications to progress from a posture in which many were filed and practically all granted to a point where practically none were filed by appellees' competitors. (R. 11.) The impact of appellees' behavior was so pervasive that it subverted the machinery and function of the P.U.C., the I.C.C. and the courts to appellees' own illegal purposes. (R. 15.)

As a result of their achieved purpose, appellees became, in effect, the regulators of certificates of public convenience and necessity, their registration and transfer, in place of the P.U.C., the I.C.C. and the courts. (R. 15.) Each appellant and other motor carrier who filed an application or considered filing an application, and who thereafter decided against it because of appellees' combination, was regulated by

appellees rather than the P.U.C., the I.C.C. or the courts. (R. 15.)³

SPECIFICATION OF ERRORS

1. *The District Court Erred in Holding that the Combination of Appellees Pleaded in the First Amended Complaint Is Not Prohibited by 15 USC §§1 and 2 (Sherman Act).*

2. *The District Court Erred in Holding that the Combination of Appellees Is Immune from the Sherman Act by Reason of the Principles Stated in Eastern Railroads Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961).*

³There were two categories of injured competitors:

1. Those carriers who considered filing applications but failed to do so because of the threat of appellees' conspiracy were adversely affected in that they were deprived of valuable business rights which, in the absence of the conspiracy, and upon application, would have been granted. (R. 11.)

2. Those carriers who have had applications on file since February 1961 have been adversely affected in one or more of the following ways:

a. If the applicant prevailed on the merits in full, in addition to detriment suffered by delay, he has been forced to expend sums of money and time which in the absence of the conspiracy would not have been required. (R. 11.)

b. If the applicant lost on the merits and did not receive valuable operating rights, he has nevertheless been required to expend money and time which otherwise would not have been required were it not for the conspiracy. (R. 11.)

c. If the applicant won or lost on the merits in the first instance but lost at the next appellate level, and if after losing at the next appellate level failed to pursue his application to the highest appellate level by reason of defendants' conspiracy, he has been deprived of potential operating rights.

d. If, before a final decision, an applicant compromised or abandoned his application, he has been deprived of valuable business rights, has suffered detriment by delay and has been required to expend sums of money and time which in the absence of appellees' conspiracy would not have been required. (R. 11.)

The holdings specified as errors appear in the Memorandum of Decision of the Hon. William T. Sweigert, District Judge (R. 44); 1967 Trade Cas., page 84,739 (N.D. Cal.) and in his letter to appellants' counsel dated October 25, 1967 (R. 68).

QUESTIONS PRESENTED

1. Do appellees' activities constitute lobbying or political activity of the type protected from the Sherman Act by the *Noerr* doctrine?

2. Have appellees' restraints been accomplished through the inducement of governmental action, as required for *Noerr* protection, rather than through direct interference with appellants' business opportunities?

3. Are appellees protected from the Sherman Act in light of their combination to deprive appellants of their First Amendment right to petition the regulatory commissions and courts?

SUMMARY OF ARGUMENT

The court below dismissed appellants' complaint on the basis of *Eastern Railroads Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). Neither case protects appellees' activities from the Sherman Act. Both cases represent a

single narrow exception to the broad application of the antitrust laws. In those cases the Supreme Court characterized the activity of the defendants as political activity which Congress did not intend to be reached by the Sherman Act. The court in *Noerr* also ruled, based upon its prior decision in *Parker v. Brown*, 317 U.S. 341 (1943), that valid state actions cannot be the subject of antitrust enforcement. The court suggested further that in the absence of carving out the "political activity" exception to the operation of the Sherman Act, problems under the First Amendment's right to petition clause would arise. Appellants contend as follows:

1. The rule stated in *Noerr* and affirmed in *Pennington* that the Sherman Act does not proscribe lobbying and other political activities is not applicable to this case. Appellees have restrained appellants not through *Noerr*-protected political activities, but through the misuses of courts and the judicial functions of the Commissions. Such activities have consistently been held to be within the ambit of the Sherman Act, as demonstrated most clearly in cases involving misuses of patent litigation for antitrust purposes.

2. *Noerr* itself provides that its own protection from the Sherman Act is not available where the anti-competitive activity involved accomplishes restraints directly upon competitors rather than indirectly through state or governmental action. In the present case, the appellees deterred and restrained appellants from obtaining operating rights by the direct threat

of judicial harassment, not through the decisions or actions of the judicial bodies themselves.

3. The rule of *Parker v. Brown*, supra, is not applicable to the present case because appellants are not attacking the decisions or actions taken by any public agency.

4. The dictum in *Noerr* that the First Amendment right to petition questions would be raised by an application of the Sherman Act in that case is not relevant to the case at bar. The right to petition courts and other judicial bodies is not an unlimited right, but is subject to reasonable regulation to prevent abuse of the right and to protect the orderly conduct of government. The right to petition does not extend to individuals who petition the judiciary for purposes of restraining trade or accomplishing other illegal objectives in the manner pleaded. In no event does the right to petition extend to appellees because they have not petitioned for redress of grievances.

5. Conversely, the First Amendment right to petition afforded appellants has been abridged by appellees through their restraints on appellants' ability to seek operating rights before the Commissions and courts. The large scale conspiratorial effort of the appellees and their consequent control over appellants' rights has permitted appellees, in effect, to displace the Commissions and courts as the state regulators of the rights involved. Because the abridgement of appellants' rights was for anti-competitive purposes, such acts are also in violation of the Sherman Act.

ARGUMENT

- I. MISUSES OF THE JUDICIAL PROCESSES OF THE COURTS AND REGULATORY COMMISSIONS FOR ANTITRUST PURPOSES ARE PROHIBITED BY THE SHERMAN ACT.
- A. The *Noerr* and *Pennington* Decisions Protect Political Activity, Not Judicial Activity, from the Sherman Act.

Appellants' basic position is that the judicial processes of the courts and regulatory agencies cannot be used to effectuate an illegal purpose. A well-established body of law, and particularly the patent-antitrust cases, has affirmed this principle.

Neither the facts nor the language of *Noerr* or *Pennington* apply to the judicial abuse cases or, for that reason, to the case at bar. Because the *Noerr-Pennington* ruling is the basic authority upon which appellants' complaint was dismissed below, appellants will discuss the cases briefly here to demonstrate what they do (and do not) stand for before discussing the patent-antitrust and judicial abuse cases upon which the complaint is based.

In the *Noerr* case, the defendants were a group of railroad companies which had conspired against a group of truckers in order to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers. The truckers brought suit against the railroad companies alleging violations of Sections 1 and 2 of the Sherman Act.

The railroad companies answered these charges by admitting that they had conducted a publicity cam-

paign designed to influence the passage of state laws relating to truck weight limits and tax rates on heavy trucks and to encourage stronger police enforcement of the state laws penalizing trucks for overweight load and other traffic violations. The defendants contended that their activities were merely aimed at informing the public and the legislatures of the several states involved of the truth with regard to the "enormous" damage done to the roads by the operators of heavy and especially overweight trucks, and of other road hazards created by the trucks.

In the district court the truckers sought to enjoin the defendants from all these activities. On appeal to the Supreme Court, however, the parties stipulated that damages would be sought only for injury to the truckers resulting from the Governor's veto of the "Fair Trucking Bill."

In finding that the defendants' activities could not be prosecuted as violations of the Sherman Act, the Supreme Court repeatedly made clear the grounds upon which this decision was reached. Throughout the opinion, the court stated that it would not apply the Sherman Act or any judicially determined anti-trust standards because to do so would be to interfere with legislative and executive actions, and thus, by implication, would be to breach constitutional separation of powers between the judiciary and the other branches of government. In order to defeat the Fair Trucking Bill, the defendants had engaged in lobbying and political activity with the legislatures of several states and the executive office of Pennsylvania. Only this activity was at issue in *Noerr*.

The *Pennington* case merely affirms the principles established in *Noerr*. The *Pennington* case, like *Noerr*, involves conspiratorial attempts to use lobbying and political pressure in order to influence the executive branch of government. As such, *Pennington* neither enlarges nor shrinks the narrow Sherman Act immunity created in *Noerr*.

In *Pennington*, a small coal company charged (in a cross-complaint to a union action) that the United Mine Workers (UMW) had conspired with certain large coal companies to restrain trade and monopolize the coal industry by driving the smaller companies out of business. The gist of the complaint was that the union and the larger companies had agreed to impose high standards and requirements on the smaller companies, knowing that the smaller companies could not meet these higher requirements and would be forced out of business.⁴ The *Noerr* issue arose from an agreement between the unions and the larger companies to approach the Secretary of Labor and secure the establishment of a minimum wage rate for coal operators selling to the Tennessee Valley Authority (TVA) under the provisions of the Walsh-Healey Act, and to solicit the executives of the TVA to purchase coal only by contracts which, in effect, excluded the spot-market sale of coal by the small

⁴These antitrust practices consisted of agreements between the unions and large companies that the large companies would mechanize the mines; that the unions would help finance the mechanization; that union wages would then be substantially increased as productivity increased with mechanization; that these higher wage increases would be demanded from smaller, unmechanized companies, even though the smaller companies clearly would not have the ability to pay; and other practices.

companies to the TVA. In short, the *Noerr* issue involved strictly lobbying and political pressure on members of the executive branch of government to take actions detrimental to the small coal companies.

Noerr and *Pennington* protect only lobbying, political activity and similar forms of petition aimed at securing the passage and enforcement of laws by the legislative and executive branches of government. In *Noerr* the court was precise in defining the exception to the Sherman Act. The court's language clearly demonstrates that it was dealing with a question of substantial impairment of the power of government to take action through its legislative and executive offices (365 U.S. at 137), and with ". . . the whole concept of representation . . ." and with "the ability of people to make their wishes known to their representatives." (365 U.S. at 137.)

Throughout the opinion, the court emphasized that it refrained from applying the Sherman Act to activity which was political in nature and which involved the right of petition to the legislative and executive branches of government. The court stated no fewer than eight times that it did not intend to interfere with the legislative or executive passage and enforcement of laws.⁵

⁵1. "We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon the *mere attempts to influence the passage or enforcement of laws.*" (365 U.S. at 135) (All emphasis added in this footnote.)

2. "We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in

At no time, however, did the court state or imply that it could not or would not control, investigate, or sanction misuses of judicial processes within the courts themselves or within agencies which exercise judicial powers and over which the courts have long exercised the power of judicial review. The court in *Noerr* made no such statement because no such issue was presented in that case, and because to do so in any event would be to overturn well established law which has permitted—indeed compelled—courts to guard with utmost care the right to fair and full hearings in adversary proceedings. Guarding against

an attempt to *persuade the legislature or the executive to take particular action with respect to a law. . . .*" (365 U.S. at 136)

3. "And we do think the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that Sherman Act forbids associations *for the purpose of influencing the passage or enforcement of laws.*" (365 U.S. at 137)
4. "For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads *at least insofar as* those activities comprised mere solicitation of governmental action with respect to the *passage and enforcement of laws.*" (365 U.S. at 139)
5. "The right of the people to inform their representatives in Government of their desires *with respect to the passage or enforcement of laws* cannot properly be made to depend upon their intent in doing so." (365 U.S. at 138)
6. "There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Moreover, *all of the evidence* in the record, *both oral and documentary*, deals with the railroads' efforts to *influence the passage and enforcement of laws.*" (365 U.S. at 142)
7. "No one denies that the railroads were making a genuine effort to *influence legislation and law enforcement practices.*" (365 U.S. at 144)
8. "That (Sherman) Act was not violated by either the railroads or the truckers in their respective campaigns *to influence legislation and law enforcement.*" (365 U.S. at 145)

a misuse of such processes in the courts and administrative agencies has traditionally been considered *not* to infringe upon Constitutional rights of petition or the functions of other branches of government. The courts have thus not refrained from applying statutory or common law remedies where such abuse exists, no matter what the purpose of such abuse, antitrust or otherwise.

Appellants believe that the court in *Noerr* clearly and unequivocally defined what it meant to protect. It called the activities political activity and lobbying. Appellants do not believe that the court had anything in mind other than the plain meaning which those words impart. When taken together with the facts of the case and descriptive passages of activities in the *Noerr* opinion, they are not subject to semantic disputes. The Supreme Court meant to protect only lobbying and political activities as they are commonly known and accepted in their traditional roles within the representative branches of government.

B. The Patent-Antitrust Cases and Other Judicial Abuse Cases Show That Appellees' Misuses of Judicial Process Are Subject to the Antitrust Laws.

If appellees' activities are not political activities as defined in *Noerr*, the only ground for exempting their conspiracy from the antitrust laws is lost to appellees, and without any further showing, the Sherman Act must apply. The Sherman Act, supported by strong public policy considerations, is broadly interpreted to cover almost every type of anti-competitive behavior not specifically exempted from the Act.

Appellees' activities in this case not only fall outside the narrow exemption provided by *Noerr*; by using the adjudicative processes of the courts and commissions in order to restrain competition, the appellees also fall directly within an area specifically prohibited by the antitrust laws.

United States v. Singer Mfg. Co., 374 U.S. 174 (1963);

Lynch v. Magnavox Co., 94 F.2d 883 (9th Cir. 1938);

Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir. 1952);

United States v. Krasnov, 143 F.Supp. 184 (E.D. Pa. 1956);

United States v. Hartford Empire Co., 46 F. Supp. 541 (N.D. Ohio 1942), *aff'd*, 323 U.S. 386 (1944);

Stewart-Warner Corp. v. Staley, 42 F.Supp. 140 (W.D. Pa. 1941);

Clapper v. Original Tractor Cab Co., 270 F.2d 616 (7th Cir. 1959).

In *U.S. v. Singer Mfg. Co.*, *supra*, Singer conspired with two Italian and Swiss companies to exclude the importation of Japanese competitors' products. The restraint and attempt to monopolize was accomplished in two basic steps. First, the defendants joined interests by withdrawing opposition to each other in patent office proceedings and cross-licensing and assigning certain patents. Second, pursuant to this conspiracy, Singer brought infringement actions in the courts and protest proceedings before the United States Tariff Commission, a quasi-judicial agency.

(374 U.S. at 188.) 'The purpose of the suits and proceedings was to restrain a competitor from competing effectively in the defendants' markets.

The Supreme Court held that the conspiracy and the proceedings taken pursuant to it were in violation of the Sherman Act. The court recognized that existing law did not declare a joining of patents illegal on its face. But when such agreements were made to restrain a competitor's activities, they ran afoul of the antitrust laws.

"Thus by intertwining itself with Gegauf and Vigorelli in such a program, Singer went far beyond its claimed purpose of merely protecting its own 401 machine—it was protecting Gegauf and Vigorelli, the sole licensees under the patent at the same time, under the same umbrella. This the Sherman Act will not permit." (374 U.S. at 193.)

The present case presents the same essential features that are found in *Singer*—a conspiracy to protect a group's position in an industry through the bringing of proceedings against competitors in the courts and agencies.

This circuit has long held that such conspiracies are in clear violation of the antitrust laws. In *Lynch v. Magnavox Co.*, *supra*, plaintiff brought an antitrust action against the defendants who, as in the present case, demurred to the complaint. The district court upheld the demurrer, and the Court of Appeals reversed, finding that plaintiff stated a good cause of action. The complaint alleged a conspiracy to restrain trade and an attempt to monopolize a part of the radio equipment industry. The method by which the

defendants accomplished their restraint was to join their patents in a conspiracy, and then, “‘under the threat of patent litigation of all asserted patent rights of all of the parties to the pool and combination,’” to force competitors out of business. (94 F.2d at 886.) More particularly, the defendants’ scheme was to have one member of the conspiracy bring an action, followed by other members bringing the same or similar actions, and thus have the conspiracy, as a group, harass competitors. (94 F.2d 886.)

Plaintiffs alleged that these actions “were not made, done, suffered to be done, or committed in good faith, or in an honest belief by defendants as to the validity of” their patents, but were committed to restrain competition. (94 F.2d 887.) In response to this allegation, and in finding a good cause of action, the court stated:

“We may assume that each of those acts would be lawful, and still a conspiracy might be shown. *If the agreement has an unlawful purpose, it is a conspiracy, notwithstanding that the means used to carry it out were lawful.*” (94 F.2d at 889; emphasis added.)

In stating that the plaintiffs brought a good cause of action, the court stressed that it was the conspiracy to restrain trade, not just the actions filed by the conspirators, which constituted the antitrust violation. If the actions filed in court were filed without probable cause or in bad faith, these actions standing alone would, of course, be illegal as antitrust restraints and malicious prosecutions. If these actions

were filed with probable cause and in good faith, they would still be illegal since they were filed as part of a conspiracy to restrain trade. In either case, the court made clear that it was the purpose of the conspiracy itself, not the individual acts taken pursuant to the conspiracy, which determined whether a violation of the antitrust laws existed. In the present case, appellants have alleged that appellees instituted their proceedings for the purpose of restraining trade and monopolizing the industry. Irrespective of whether appellees had colorable ground for protesting appellants' applications, if such proceedings were brought pursuant to an illegal purpose, such activities are prohibited by the Sherman Act. *Noerr* does not overturn this law. *Noerr* does not deal with conspiracies to restrain trade by harassment through the judicial processes of the courts and commissions.

Other courts have also confirmed the antitrust doctrine established in *Singer*, *Lynch* and similar cases. In *Kobe, Inc. v. Dempsey, supra*, the plaintiffs joined together to bring an alleged patent infringement action against the defendants. The defendants, in a cross-complaint, alleged inter alia that the plaintiffs had conspired to restrain the defendants' trade; that the infringement action was instituted pursuant to this conspiracy; and that the infringement action was in itself unjustified and brought in bad faith.

The trial court found that the defendants had stated a good cause of action in their cross-complaint, and a trial ensued. The trial court found that plaintiffs' conspiracy was a violation of the anti-

trust laws, and awarded damages and entered an injunction against the conspiracy. Plaintiffs appealed the decision on the cross-complaint and the Circuit Court of Appeals affirmed. The plaintiffs (cross-defendants in the antitrust action) in *Kobe* contended on appeal that they had believed there was a genuine infringement of their patents and that they had the right to use available legal forums in order to protect their interests. In refuting this contention, the Court of Appeals stated:

“We fully recognize that free and unrestricted access to the courts should not be denied or imperiled in any manner. *At the same time we must not permit the courts to be a vehicle for maintaining and carrying out an unlawful monopoly which has for its purpose the elimination and prevention of competition.*” (198 F.2d at 424; emphasis added.)

Concerning the plaintiffs’ contention that their infringement suit against defendants was brought in good faith and was therefore immune to antitrust attack, the court accepted the trial court’s findings that the plaintiffs had believed in good faith that their rights were infringed, but the court also found that the infringement suit itself was brought primarily in furtherance of a conspiracy to restrain competitors. It was the conspiracy to restrain trade, not the steps taken pursuant to it standing alone, which the court found in violation of the antitrust laws.

“We have no doubt that if there was nothing more than the bringing of the infringement

action, resulting damages could not be recovered, but that is not the case. The facts as hereinbefore detailed are sufficient to support a finding that *although Kobe believed some of its patents were infringed, the real purpose of the infringement action and the incidental activities of Kobe's representatives was to further the existing monopoly and to eliminate Dempsey as a competitor.* The infringement action and the related activities, of course, in themselves were not unlawful, and standing alone would not be sufficient to sustain a claim for damages which they may have caused, *but when considered with the entire monopolistic scheme which preceded them we think, as the trial court did, that they may be considered as having been done to give effect to the unlawful scheme.* (Citing cases)" (198 F.2d at 425; emphasis added.)

* * *

"To hold that there was no liability for damages caused by this conduct, though lawful in itself, would permit a monopolizer *to smother every potential competitor with litigation . . . and leave the competitor without a remedy.*" (198 F.2d at 425; emphasis added.)

This decision applies directly to the case at hand, where to allow the appellees as a group to indulge in unlimited judicial proceedings against appellants, whether such proceedings individually are brought with or without probable cause in themselves, is to allow the appellees to restrain trade and create an effective monopoly in violation of the Sherman Act.

In *United States v. Krasnov, supra*, the defendants were charged with conspiring to restrain trade and

create a monopoly by excluding competitors from the defendants' patent pool and by harassing competitors with infringement suits. Similar to the case at hand, the defendants in *Krasnov* agreed to bring harassment suits upon the mutual consent of the members of the conspiracy and upon a sharing of the costs of the suits.

On a motion by the government for summary judgment, the court held that the defendants' activities violated the antitrust laws. On the issue of the defendants' misuse of judicial process, the court stated:

"That the harassing suits against competitors, previously discussed in some detail, were designed as and were actually only harassing suits is clear from an examination of the correspondence between the parties and the court feels that such conclusion is inescapable from an objective analysis of the documents. All of these actions taken in concert constitute a clear violation of the Sherman antitrust act. . . ." (143 F.Supp. at 202.)

This language might well have been written for the present case. Appellants not only have pleaded the existence of harassing activity constituting a good cause of action, but also possess correspondence and other evidence sufficient to prove the allegations at trial.

Systems of litigation for anti-competitive purposes have been broadly condemned. In *U.S. v. Hartford-Empire Co.*, *supra*, the District Court described the system used there:

"Another part of the plan was a system of litigation against all remaining outsiders. Here the

power of litigation pursued by a strong combination of two companies, one of which, Hartford, was dominated and partially owned by a third powerful company, Corning, backed by unlimited financial means, is brought into play against individual companies, most of them small manufacturers of glass products. Suits were brought against Hazel-Atlas, Kearns-Gorsuch, Lamb, Nivision-Weiskopf and Ober-Nester. The expense of this litigation was shared equally between Hartford and Owens, and this expense was by no means small. The record discloses that Hartford expended substantially \$900,000 in the pursuit of litigation against so-called outsiders. The Hartford Company did most of the work, but Owens contributed a substantial part, and the patent lawyers of both companies were continually consulting each other with respect to both substance and procedure." (46 F.Supp. at 565.)

There is no meaningful distinction between the systems described in *Hartford-Empire*, *Singer* and other cases cited here and the system contrived by appellees.

See also *Stewart-Warner Corp. v. Staley*, *supra* (Allegations that parties joined in concerted action to threaten competitors with bad faith litigation states a good cause of action under the antitrust laws);

Clapper v. Original Tractor Cab Co., *supra* (Attorneys' fees should be included in anti-trust damages awarded against defendants who conspired to misuse patents by bringing unfounded suits against competitors).

C. A Misuse of the Judicial Processes of the Commissions Is Indistinguishable from Misuses of the Courts. Both Activities Alike Are Prohibited by the Antitrust Laws.

Appellants have pleaded that appellees have used the United States courts and the Supreme Court of California in their plan of anti-competitive litigation. (R. 4.) That such a program to restrain trade falls within the antitrust laws, appellants believe, cannot be doubted.

A conspiracy to restrain competition is no less a violation of the antitrust laws when it is effected through a perversion of the adjudicating processes of the commissions than of the courts. This proposition was established, for example, in the *Singer* case, *supra*, where the method of restraint employed by the defendants' conspiracy was to bring infringement suits in the courts and adversary proceedings before the United States Tariff Commission.

The essential similarity of adversary proceedings in the courts and the agencies has also been established by the law of malicious prosecution. The courts have recognized that one does not have a right to bring an action or proceeding without probable cause in a court *or* administrative body. This principle was succinctly stated in *Melvin v. Pence*, 130 F.2d 423 (D.C. Cir. 1942), where the court refuted the contention that a misuse of administrative bodies differed from a misuse of courts. The court stated:

“We agree with plaintiff that these principles (prohibiting misuse of courts) are clearly applicable to administrative proceedings. Much of the jurisdiction residing in the courts has been

transferred to administrative tribunals, and much new jurisdiction involving private rights and penal consequences has been vested in them. In a broad sense, their creation involves the emergence of a new system of courts, not less significant than the evolution of chancery. The same harmful consequences may flow from the groundless and malicious institution of proceedings in them as does from judicial proceedings similarly begun. When one's livelihood depends upon a public license, it makes little difference to him whether it is taken away by a court or by an administrative body or official. *The administrative process is also a legal process, and its abuse in the same way with the same injury should receive the same penalty.*" (130 F.2d at 426; emphasis added.)

* * *

"In our judgment no other conclusion would be tenable. When private as well as public rights more and more are coming to be determined by administrative proceedings, it would be anomalous to have one rule for them and another for the courts in respect to redress for abuse of their powers and processes." (130 F.2d at 427.)

See also *National Surety Co. v. Page*, 58 F.2d 145 (4th Cir. 1932).

The questions arise, however, whether the particular administrative agencies involved in this case—the P.U.C. and I.C.C.—function as courts and, if so, whether those functions have been used by appellees as the methods for their restraints. Appellants believe both questions must be answered in the affirmative.

Reams have been written in a fruitless search for an analysis which will characterize regulatory agen-

cies as "quasi-judicial" or "quasi-legislative." Appellants do not wish to engage in this search. No label given to these agencies should decide the crucial issue of what agency functions are involved in this action. The fact is that most regulatory agencies, including the P.U.C. and I.C.C., are a kind of fourth branch of government performing functions some of which are judicial in nature, some legislative in nature, and some even executive in nature.

That the P.U.C. performs judicial functions, and to that extent is a judicial body, was established unequivocally by the California Supreme Court shortly after the passage of the California Public Utilities Act of 1911 in *Pacific Telephone & Telegraph Co. v. Eshleman*, 166 Cal. 640 (1913). In that case, after a hearing before the P.U.C., and upon appeal to the California Supreme Court, Pacific Telephone raised certain jurisdictional questions which included the arguments that a "proceeding [before the Commission] sought to be brought up for review must in its nature be a judicial proceeding," and that a Commission proceeding in that case was not judicial. (166 Cal. at 648.) In deciding the jurisdictional questions, the Supreme Court stated as follows:

"A minor branch or corollary of the main argument upon these jurisdictional questions rests upon the proposition that in the matter here under review the Railroad Commission was not exercising judicial functions, but that its acts were purely legislative or legislative-administrative. As the Public Utilities Act is here for the first time before this court, as the question is thus

fairly within this case, and as to ignore it is but to necessitate its consideration in subsequent litigation, it is proper to say that *we hold the powers and functions of the Railroad Commission in many instances, and in the present one, to be of a highly judicial nature.* That judicial powers were with deliberation vested in the Commission the language of the constitution and of the legislative enactments following the constitution leave no doubt. Thus the constitution itself declares: ‘The Commission shall have the further power . . . *to hear and determine complaints against railroad and other transportation companies; to issue subpoenas and all necessary process and send for persons and papers; and the commission and each of the commissioners shall have the power to administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record.*’ (Sec. 22, art. XII.) While without quoting, a reading of sections 22 and 23 of article XII of the constitution and of sections 53 to 81 of the Public Utilities Act will establish beyond doubt that the Railroad Commission is empowered to sit, and in the performance of its most important duties must sit, as a tribunal exercising judicial functions of great moment. It may be said that the final order of the commission in many instances is legislative-administrative in character, but nonetheless the *ordained procedure by which this result is to be reached, the determination of controverted facts between private litigants and disputants, and the decision upon these controverted matters, are strictly judicial.* (*Robinson v. Sacramento*, 16 Cal. 208; *Imperial Water Co. v. Board of Supervisors*, 162 Cal. 14 [120 Pac. 780]).” (Emphasis added.)

With respect to the P.U.C., the following passage from McKeage, *Public Utility Regulatory Law* (1956) makes the same point:

“Much has been said concerning the internal adjudicating process of an administrative tribunal; that is, the procedure whereby such tribunal arrives at its decision. Very probably, the internal adjudicating process of the average administrative tribunal, in actual fact, is on par with that same process in the average court. *Judges and lawyers realize that where this particular process is corrupted or perverted, strict adherence to due process of law in other fields can be rendered futile and of no consequence.* Courts are no more exempt from this fault than are administrative tribunals. In the final analysis, faithful adherence to due process of law in *this particular phase of the administration of justice* depends upon the integrity of the members of the tribunal exercising the adjudicating process.” (At p. 84; emphasis added.)

* * *

“In and of itself, there is no magic in the term ‘court.’ As a matter of fact, at least one of the state public utilities commissions (that of California) *is a court of record* in addition to being an administrative tribunal. The State Constitution so created it and no State court, except the Supreme Court to a very limited extent, may interfere in any way with its action or decisions. *It has the power, as does each commissioner thereof, to commit and punish for contempt, and its function, in many cases, is exclusively that of a court, such jurisdiction having been taken from the*

courts and given to it." (At pp. 84-85; emphasis the author's.)

* * *

"In fact, the Commission is both a court of record and an administrative tribunal and, in many instances, exercises purely judicial functions, such functions having been taken from the courts by the Legislature and deposited with the Commission pursuant to the plenary authority contained in Article XII of the State Constitution." (At pp. 106-107.)

The I.C.C. also acts largely as a court, as demonstrated by the Code of Ethics for Practitioners, Rules 2 and 8.

"2. The Duty of the Practitioner to and His Attitude Towards the Commission

In many respects the Commission functions as a Court, and practitioners should regard themselves as officers of that Court and strive to uphold its honor and dignity. The Commission, not being wholly free to defend itself is peculiarly entitled to receive the support of the practitioner against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a member or employee of the Commission it is the right and duty of the practitioner to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected." (Emphasis added.)

"8. Private Communications with the Commission

In the disposition of contested proceedings brought under the Interstate Commerce Act the

Commission exercises quasi-legislative powers, but it is nevertheless acting in a quasi-judicial capacity. It is required to administer the Act and to consider at all times the public interest beyond the mere interest of the particular litigants before it. To the extent that it acts in a quasi-judicial capacity, it is grossly improper for litigants, directly or through any counsel or representative, to communicate privately with a commissioner, examiner or other representative of the Commission about a pending cause, or to argue privately the merits thereof in the absence of their adversaries or without notice to them. Practitioners at all times should scrupulously refrain in their communications to and dismissions with the Commission and its staff from going beyond *ex parte* representations that are clearly proper in view of the administrative work of the Commission.” (Emphasis added.)

The question, then, is not whether the P.U.C. and I.C.C. are arms of the legislature or the judiciary—clearly they are both—but which of these functions is involved in the present case. To make that determination, more particular distinctions must be drawn between the judicial and legislative functions which take place within the agencies themselves. Judge Friendly’s article entitled “The Federal Administrative Agencies: The Need for Better Definition of Standards,” 75 Harv. L. Rev. 863 (1962) makes the controlling distinctions.

“... I find valid and important the distinction between what anyone would recognize as a clear delegation of legislative power, with no quasi

about it—I have cited the SEC's rule-making power for short sales as an instance—and the application of a general standard to a myriad of instances. * * * The SEC's rules in regard to short sales are the sort of things which Congress could well have put out on its own; they are no more detailed than many provisions of the income tax. The reasons for delegation in that instance are simply that Congress does not have the time, or the will, to do all these things and that, even if Congress initially promulgated a set of rules on short sales every bit as good as the SEC's, it would be too hard for Congress to effect change, in an area where speedy change may be needed. In contrast, the very nature of Congress, with one house having 100 members and the other 435, makes it wholly unfit to determine the rail and truck rates on new automobiles or who should run the television station in Kankakee; the difficulty is not just lack of time but an institutional lack of aptitude. Unlike the short sale rules, such decisions involve not a prescription for the whole or even a segment of an industry but the application of a standard to a concrete case, requiring not only the *determination of the standard but also the accurate ascertainment and proper weighing of scores of subsidiary facts and, in the first example, the consideration of a vast complex of relationships*. From a practical standpoint, therefore, it may be slightly misleading to characterize true administrative adjudication as 'delegation' by the legislature; a body cannot 'delegate' in any meaningful sense the performance of action it would be incapable of taking on its own even if it had the time and the desire." (75 Harv. L. Rev. at 871; emphasis added.)

Judge Friendly explains this matter further:

“It will scarcely have escaped your attention that the application of standards of greater or less generality to concrete cases is not a function peculiar to administrative agencies; it has long been practiced by other institutions not unknown to law students. Indeed, at one end of the administrative spectrum, *it is hard to discern much difference between either the problem or the decisional processes of the agencies and those of the courts.*” (75 Harv. L. Rev. at 874; emphasis added.)

Appellants must emphasize again that it is only appellees’ abuse of the *adjudicative* functions of the P.U.C. and I.C.C. that are in issue here, not an abuse of the general rule making procedures of the Commissions. Where the appellees have lobbied or used informal political pressure to influence the Commissions’ establishment of general rules and regulations applicable to the industry as a whole, appellants believe no complaint can be sustained. Such a function on the part of the Commissions is, as Judge Friendly characterizes it, legislative in nature, and within the protections (and limitations) provided by the *Noerr-Pennington* exemption.

But such pressures are not the methods of which appellants complain. Appellants were damaged by appellees’ conspiracy to harass and deter appellants in contested certificate and transfer proceedings in which the Commissions adjudicated the proceedings as a court. Individual appellants petitioned the Commission for a determination of requested rights not for

the industry as a whole, or even a segment of it, but for the particular applicant alone. Each applicant presented a separate concrete case requiring the "accurate ascertainment and proper weighing of scores of subsidiary facts" under the standard of public convenience and necessity. The procedure by which this ascertainment was made, and by which each case was disposed, was judicial from beginning to end, as outlined in the statement of the case above. There can be no doubt that the restraints on appellants in the Commissions were effected through litigation and judicial proceedings and, as such, are subject to the prohibitions of the patent-antitrust cases.

D. The Court Below Misconstrued the Scope and Meaning of the Patent-Antitrust Cases in Failing to Apply Them to the Case at Bar.

The court below distinguished the present case from the patent antitrust cases upon two grounds. First, the court stated that because in those cases there was antitrust activity *in addition to* the filing of harassment suits, and no such additional activity is alleged in the present case, the patent cases do not support appellants' position that mere judicial abuse is sufficient to obtain relief. (R. 63; 1967 Trade Cas., page 84,746.) Appellants respectfully disagree. The invalidity of such a distinction may be illustrated by a comparison between *Pennington* and *Singer*.

In *Pennington* the conspirators engaged in both protected (lobbying) and non-protected anticompetitive activity. The plaintiffs asserted that because approaches by the defendants to the TVA and the

Secretary of Labor were but part of an entire plan of illegal conduct, such approaches were inseparable from the total conspiracy, and therefore should have been condemned with the related activity. The court rejected this contention with the following language:

“Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed and, given the obviously telling nature of this evidence, we cannot hold this lapse to be mere harmless error.” (381 U.S. at 670.)

The plaintiffs there were not entitled to an instruction that if the lobbying activities were but a part of an overall anti-competitive scheme, part of which included activities within the Sherman Act, the whole scheme could be declared unlawful. Instead, the Supreme Court segmented the defendants' activities and held that some of them violated the Sherman Act while others—lobbying—did not. This separation of activities arose with respect to the recoverability of damages. Plaintiffs suffered substantial monetary damages by reason of executive action induced by the lobbying activities of the mine owners and the UMW directed to the TVA's purchasing agent and the Secretary of Labor. The court held that damages arising from these activities were not assessable. Plaintiffs were, however, awarded damages resulting from activities other than lobbying and actions taken by the TVA and Secretary of Labor.

A different result is found in *Singer* and the other patent-antitrust cases. In those decisions the Sherman Act was held to be fully applicable to the misuse of judicial machinery. Distinctions have not been made between the anti-competitive behavior of defendants' misuse of judicial machinery and their other behavior not involved with judicial machinery. No decision known to appellants has held that damages could be recovered for one form of behavior but not for the other. On the contrary, in every patent-antitrust or other judicial harassment case, damages have been given not only for anti-competitive activities implemented without the use of judicial procedures, but also for those damages resulting directly from judicial misuse. The clear implication is that judicial harassment in itself, as in malicious prosecution cases, is enough to make out a good cause of action.

Appellants have never asserted, nor would the law support the proposition, that the mere filing of actions without an antitrust purpose can be an antitrust violation. However, appellants disagree with the court below that a plan of litigation, the purpose of which is to restrain trade, with no further acts done or contemplated, cannot be the subject of an antitrust action.

Second, the District Court distinguished the patent-antitrust cases on the simple ground that patents and certificated rights are different, the antitrust laws applying to conspiratorial misuses of the former but not to the latter. (R. 64; 1967 Trade Cas., page 84,746.) Appellants do not believe that certificated carriers are any less subject to the antitrust laws than patent hold-

ers. Both patents and certificates are forms of a legal monopoly. Both are subject to protection—or abuse—through litigation. The use of such combined power for anti-competitive purposes, whether it arises from a group of patent holders, a group of certificate holders, or from any other combination of economic power, is behavior which the antitrust laws condemn.

This proposition is well expressed by Toulmin, *Antitrust Laws*, Vol. IV, p. 572:

“If patent pools are used in a conspiracy—to delay the issuance of patents; if agreements are executed taking from the Patent Office its right of decision as to who was the first inventor; if courts are deprived of the opportunity of determining whether patents, which apparently dominate an industry, are valid; or if a conspiracy is entered into to prevent such patents from being litigated—all of these things may be earmarks of illegal acts.

“In all these things, a common core of truth appears: *It is not the vehicle of the patent pool or the patent that constitute a mechanism of illegality; it is the extracurricular uses to which patents and patent pools are put that spell disaster under the antitrust laws to those who practice such unreasonable restraints in the competitive area.*” (Emphasis added.)

The aims of the conspiracy mentioned above are strikingly similar to the aim of appellees. Misuse of courts is most often found in patent-antitrust cases because patent protection involves judicial proceedings. The same, however, is true of certificates of public convenience and necessity. Misuse of the courts and

commissions as a means of effecting an unreasonable restraint is a violation of the antitrust laws no matter where found. The patent-antitrust cases cited by appellants in support of this principle, it should be stressed, were brought to enforce the antitrust laws, not the patent laws.

Each appellee owned certificates granted by the P.U.C. and I.C.C. Each certificate gave its owner the exclusive right to operate as provided in the certificate. That exclusive right was at all times, however, subject to the policy and decisions of the P.U.C. The policy as expressed in their decisions was one favoring competition and a liberal granting of rights. Accordingly, the rights of appellees were limited rights which could not lawfully, within the regulatory scheme, be expanded or made more extensive than the P.U.C. policy permitted.

By employment of their combined power, however, appellees have aggrandized their own common carrier rights in excess of the purview of the regulatory scheme by successfully deterring competitors from seeking competitive rights. The policy of the P.U.C. was to grant certificates liberally. The regulatory scheme provided for competition and, therefore, appellees were not entitled to have their own certificated rights free from competition. The court below recognized the competitive nature of the "certificated" business when it said of appellants:

"They are simply certificated business entities in an industry which is competitive within a framework of regulation according to standards of pub-

lic convenience and necessity.” (1967 Trade Cas., page 84,746; R. 64.)

The combination of appellees, like the combinations of patentees, sought to expand the value of their rights by thwarting competitors by means of a system of litigation, contrary to the policy of controlling statutes and government agencies. That the P.U.C. had a policy in existence which provided that certificated carriers’ rights be limited by the competition of other competing certificated carriers cannot be doubted, but is in any event a matter of proof.

E. The Sherman Act Prohibits All Unreasonable Restraints of Trade in the Absence of Specific Exemptions from the Act. Nothing in the Rationale of Noerr-Pennington, Parker v. Brown, the First Amendment or Other Law Exempts Appellees’ Activities from the Antitrust Laws.

The Sherman Act has been interpreted by the Supreme Court to reach all anti-competitive activities to the fullest extent permissible within Constitutional limits. *Aper Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *United States v. Frankfort Distillers, Inc.*, 324 U.S. 293 (1945). The Act has great scope in both its adaptability and application, *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958); *United States v. Hutcheson*, 312 U.S. 219 (1941), and condemns all combinations which unreasonably restrain trade. *United States v. Union Pacific R.R. Co.*, 226 U.S. 61 (1912); *United States v. Line Material Co.*, 333 U.S. 287, 309-310 (1948).

Out of these broad rules of application the Supreme Court has carved certain exceptions, as discussed in

both the holding and dictum of *Noerr*. None of these exceptions, however, encompass anti-competitive schemes of litigation. Nothing in *Noerr* or other authority exempts such activity from the Sherman Act.

The court in *Noerr* refused to apply the Sherman Act to the defendants' activities for essentially three reasons: (1) The Act was found as a matter of statutory construction not to reach political activity because of the adverse impact it would have on our representative form of government; (2) An issue at stake was one of valid government action (passage of the Fair Trucking Bill) excepted from antitrust sanctions under the rule of *Parker v. Brown*; (3) To apply the Act to the facts of *Noerr* was said to raise Constitutional questions concerning the right to petition.

First, the court held that the defendants' combination to influence the political machinery of government was essentially dissimilar to the type of private restraints condemned by the Sherman Act. To extend the Act to such activity would, in the court's view, impair the power of representative government to act on the basis of information provided by its constituents. The court stated its position as follows:

"In the first place, such a holding [applying the Sherman Act] would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known

to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." (365 U.S. at 137.)

It is apparent that the concern of the court was to preserve the ability of government to act in its representative capacity, through the legislative and executive branches. In so ruling the court believed that intrinsically and fundamentally involved in that role of government is the ability of citizens freely to inform government of their wishes. This is the substance of the activity which is protected by *Noerr*.

These protective considerations do not inhere in the judiciary. Neither *Noerr* nor *Pennington* deal expressly or implicitly with uses of the judicial branch of government. In fact, neither *Noerr* nor *Pennington* even refer to the principles governing misuses of judicial processes set forth in the patent-antitrust cases even though those principles were established law at the time *Noerr* was decided. Certainly the court did not intend to overrule the patent-antitrust cases or the judicial abuse cases *sub silentio* in *Noerr*. This is also clear inasmuch as the court affirmed the illegality of abusive litigation in the *Singer* case two years after *Noerr*, without comment on the *Noerr* exception to the Sherman Act.

That the *Noerr* principle and patent-antitrust principles should not have come into conflict with each other is perfectly understandable. Both principles are derived from different factual circumstances, and both afford different legal protections. *Noerr* did not deal with anti-competitive uses of the judicial function because there was nothing in *Noerr* giving rise to the need to do so. The legal standards and rhetoric set forth in *Noerr* are not understandable or even decipherable as the standards or rhetoric applicable to the role of judicial tribunals as we know them in this country. Judicial tribunals are not representative bodies of government. Nor is it traditionally the role of the judicial branch to become the forum for pressure group activity of the informal, open, free-flowing nature essential to successful representative government by the legislative and executive branches. Such activity, as the language of *Noerr* indicates, is foreign to basic judicial concepts.

The holding of *Noerr* cited above signifies the further concern of the court with maintaining the traditional separation of powers between the judiciary on the one hand and the legislative and executive branches on the other. In *Noerr*, application of the Sherman Act to what were clearly found by the court to be political activities would have been an intrusion by the judiciary upon vital activities necessary to the proper operation of the two representative branches of government. Court-made law which would interpose restraints upon the manner and extent of lobbying these branches would be a serious breach of the

doctrine of separation of powers. The Sherman Act is a court administered law. The determinations of the courts in interpreting the Act has resulted in a substantial body of precedent which is the law of the land. Any interpretation of the Sherman Act which would purport to limit or prescribe to the legislative and executive branches the means or extent to which lobbying activities may be conducted, would constitute an unjustifiable intrusion by the court into matters constitutionally reserved to those other branches. The doctrine of separation of powers is a settled part of constitutional law and would prevent such activity by the courts. *Fletcher v. Peck*, 6 Cranch 87 (1810); *Zorach v. Clausen*, 343 U.S. 306 (1952.) See also *Baker v. Carr*, 369 U.S. 186 (1962.)

The second exception to the Sherman Act's wide coverage relied upon by the court in *Noerr* was its application of the rule of *Parker v. Brown* to the facts of the case. The court in *Noerr* stated:

“Accordingly, it has been held that where a restraint upon trade or monopolization is the *result of valid governmental action, as opposed to private action*, no violation of the Act can be made out.” (365 U.S. at 136; emphasis added.)

Appellants do not argue with the rule of *Parker v. Brown*. The rule simply does not apply to appellants' case.

In *Parker v. Brown*, state directed action was placed under anti-trust attack. The defendants were the California State Director of Agriculture, Members of the State Agricultural Prorate Advisory Commission,

Members of the Program Committee for Zone No. 1, and others. Every defendant in that case was appointed under authority of state law and charged with the administration of the Prorate Act. The Prorate Act provided for reduced production, thus restricting competition among growers and price maintenance. (317 U.S. at 346.) In the absence of statutory authorization for both the official existence of defendants as government administrators and their acts, the challenged activities would have been violative of the antitrust laws.

The claim in *Parker v. Brown* was nothing more than a direct attack upon the carrying out of legislation by persons charged with the responsibility of doing so. It was an assault upon state directed action with which all growers were required by law to comply, rather than an assault upon a private combination acting through their own means.

The proration plan of *Parker v. Brown* was legislatively approved. For this reason, it was state action, not individual action. The discharge of the legislative mandate by a Director, a Commission and a Committee and a vote, all included in the state command, was clearly government action and not individual action. The enforcement of the prorate plan was also authorized and detailed by the state and carried out under its banner. (317 U.S. at 345-348.)

Parker v. Brown distinguished between the Sherman Act application to acts of identical nature, one performed by the government and the other by private individuals:

“We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate.” (317 U.S. at 350.)

The court described the activity which it ruled Congress had not intended to prohibit by the Sherman Act:

“Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter’s words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application.” (317 U.S. at 352.)

In the case before the court the formulation of the plan was not approved by any government agency.

It was "individual and not state action." (*Parker v. Brown*, 317 U.S. at 352.) Nor was the effectuation of the plan—the hiring of attorneys, the contributing of money and the filing of protests—legislatively directed.⁶ Nor was the enforcement of appellees' plan done pursuant to a legislative or government plan of action. The plan was enforced by dissemination of their plan to other carriers, not to government officials. The threat of use and actual use of these great combined economic forces was brought to bear not upon government but upon competitors. Competitors of appellees had to sustain the economic burden imposed, not the state or its agencies. In the case at bar, state action does not stand between the appellees' activities and their impact upon appellants. Appellants do not seek damages or injunctive relief because of rulings and decisions made by agencies and courts directing that certain acts be performed or foregone by appellees. They seek, rather, relief from the acts of appellees who acted voluntarily without state mandate. Appellees' actions were individual actions, not voluntary state actions. Individual anti-competitive actions, unless they are political activity or constitutionally protected, cannot survive the Sherman Act.

In *Noerr* the Supreme Court summarized its prior holding in *Parker v. Brown*. At footnote 17 of *Noerr* the court said:

⁶Mere authorization by statute permitting the filing of protests does not legalize violations of the antitrust laws achieved through the use of such means. *Marnell v. United Parcel Service of America, Inc.*, 260 F. Supp. 391 (N.D. Cal. 1966).

“In *Parker v. Brown*, 317 U.S. 341, 87 L ed 315, 63 S Ct 307, *supra*, this Court was unanimous in the conclusion that the language and legislative history of the Sherman Act would not warrant the invalidation of a state regulatory program as an unlawful restraint upon trade. In so holding, we rejected the contention that the program’s validity under the Sherman Act was affected by the nature of the political support necessary for its implementation—a contention not unlike that rejected here.” (365 U.S. at 137.)

In *Noerr* as in *Pennington* the Supreme Court rejected the granting of damages and injunctive relief where it would have had to find that duly achieved acts of the executive and the legislative branches contravened the Sherman Act. The basis of its refusal to invalidate executive and legislative actions taken to the detriment of the truckers and small mine operators, though anti-competitive in nature and clearly induced by private interests, was the rationale of *Parker v. Brown* that the court will not invalidate government action on the basis of the Sherman Act. Appellants have neither sued the government nor are they seeking to invalidate government action. Therefore, *Parker v. Brown* is clearly not applicable.

In *Noerr* the truckers sought injunctive relief only as to the acts of private defendants acting as individuals and not as to acts of government, as was attempted in *Parker v. Brown*. However, damages were prayed for against the private defendants for proximate injury resulting only from the governor’s

veto of the "Fair Trucking Bill." (365 U.S. at pp. 130-131.) Neither damages nor injunctive relief were granted because the activities of defendants were found to be purely political and the governor's veto was held to be government action, which it obviously was.

In *Pennington* only damages were discussed (381 U.S. at 669) and as in *Noerr* the court permitted no damages against the private parties because it was clear "under *Noerr* that Phillips could not collect any damages under the Sherman Act for any injury it suffered from the action of the Secretary of Labor" (381 U.S. at 671). However, in *Pennington* damages could have been awarded for defendants' activities which were not actions of the government and did not constitute lobbying.

The act of lobbying by private parties is not government action. Government action can be neither the basis of damages nor an injunction. The act of lobbying by private persons, if considered separately from the government action it seeks to induce, may or may not cause damage. In *Noerr* the publicity campaign, which was found to be an effort, without sham, to influence elected officials, did not in and of itself, without government action, cause damage to the truckers. At least such damage was not claimed because it was stipulated in that case that truckers would seek damages resulting only from the governor's veto.

Appellants believe that it is important to distinguish between the activity of a political nature by

private parties on the one hand, and the ultimate implementation of such activities in the form of government actions or inaction on the other. In the case at bar, appellants have made it clear that they seek neither damages nor injunctive relief for government action or inaction no matter now induced. Accordingly, the question of the rulings or orders of the P.U.C., I.C.C. and courts is not present here. Only the activity of appellees—apart from government review—is at issue in this case. Appellants seek damages for such activities only because they were not political activity and, in the main, were not initiated to induce government action. Hence, appellees are subject to the Sherman Act to the extent that their actions caused damages to appellants. This is so even if additional damages occurred which are not recoverable by appellants because such injury may have resulted from valid government actions or legitimate political activity.

A third exception to Sherman Act application arises in situations where Constitutional freedoms protected by the First Amendment might be abridged by the Act's application. The Supreme Court did not decide in *Noerr* whether such Constitutional rights of defendants would have been violated by the application of the antitrust laws, but acknowledged the presence of the question. The court said:

“Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course,

lightly impute to Congress an intent to invade these freedoms.” (365 U.S. at 137.)

Although the holding of *Noerr* was based on a construction of the Sherman Act and not the First Amendment,⁷ it is implicit in the decision’s language that had the court found the activities of the defendants to be within the reach of the Sherman Act, it would have dealt with the question of whether they were protected by the First Amendment’s right to petition for redress of grievances.

The First Amendment does not protect the activities of appellees for two reasons: (1) The right to petition is not an unlimited right. Its limitations and purpose are different in judicial bodies than in the legislative and executive branches of government, and (2) The right is available only to parties who genuinely seek to influence government action. Appellees did not genuinely petition for this purpose.

The right to petition any branch of government, whether legislative, executive or judicial, has never been unlimited. Reasonable regulation of such activities has frequently prevailed against the assertion that there is an absolute constitutional right. *Wilkinson v. United States*, 365 U. S. 399 (1961).

⁷The court stated this position in footnote 6 of the decision:

“The answer to the truckers’ complaint also interposed a number of other defenses, including the contention that the activities complained of were constitutionally protected under the First Amendment Because of the view we take of the proper construction of the Sherman Act, we find it unnecessary to consider any of these other defenses.” (365 U.S. at 132)

The right to petition the judiciary, however, has been treated differently from the right to petition other branches of government. The general meaning of the right to petition government for redress has been held to be a right which existed prior to the adoption of the United States Constitution. The Supreme Court described its origin in *United States v. Cruikshank*, 92 U.S. 551 (1876) :

“The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It derives its source, to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 211 [6 L.Ed. 23], ‘from those laws whose authority is acknowledged by civilized man throughout the world.’ It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection.”

In the case of *In re Stolen*, 193 Wis. 602, 216 N.W. 127 (1927), the court examined the difference between the right to petition before courts and the right to petition representative branches of government:

“[4] Thus far our discussion has related to petitions as popularly understood. There is a class of petitions which may properly be addressed to courts. They are petitions which conform to the ordinary course of judicial procedure and serve to arouse the jurisdiction or

action of the court upon justifiable matters. This very proceeding was instituted by a petition signed by the officers of the Dane County Bar Association. That petition aroused the jurisdiction, or action, at least, of this court in the premises. Petitions which have been established as a part of judicial procedure may be presented to courts, and such petitions are the only ones protected by the constitutional provision here invoked." (216 N.W. at 129.)

The distinction between treatment of courts and other branches of government with respect to the right of petition is relevant to illustrate that in *Noerr* the court was clearly alluding to the right to petition representative government. There the court was concerned with the right of people freely to inform government of their wishes in order that the concept of representative government might work. No such concept has ever applied to the judicial branch.

Appellants do not claim that appellees' protests were not incidentally attempts to influence the outcome of judicial proceedings. They were proper in form to be addressed to the courts and agencies. But a use of proper documents does not qualify the appellees for First Amendment protections. The standards governing petitioning of judicial bodies are narrower than those governing access to representative government even though all are protected to a greater or lesser degree by the Constitution.

In *Stolen*, after distinguishing the right to petition courts from other rights to petition, the court made

clear that the former right would not shield persons from abuse of the right:

“[6] Before closing our discussion on this subject, it may be well to refer to the fact that the Constitution guarantees liberty of speech as well as liberty of petition. While there seems to be no recorded case of an attempt to influence the court by petition, there are plenty of cases in which such attempts have been made through the columns of the press. This is generally held to be an abuse rather than an exercise of the right of free speech, and it is well settled that such efforts to influence the course of justice constitute contempt of court. 6 R. C. L. 508 et seq. The right of petition is no more sacred than the right of free speech, and, as there may be an abuse of the right of free speech, so may there be an abuse of the right of petition. Any attempt to influence the courts of justice constitutes an abuse of either right.” (216 N.W. at 129.)

See also *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

The principle that citizens must have free and open access to the courts is applicable to appellants and appellees alike. *Saunders v. Shaw*, 244 U.S. 317 (1917). Both parties possess as part of their right to petition courts the right to prompt determination without delay. *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185 (1959). They each have these rights but neither has the right to abuse them.

Like the right to petition courts, the right of free speech and press must fall when acts of private citi-

zens make unseemly efforts to pervert judicial action. *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941); *Freeman v. Maryland*, 380 U.S. 51 (1965). In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Supreme Court held that free speech must not be allowed to divert a trial from the very purpose of the court system:

“[2] But the Court has also pointed out that ‘[1]legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.’ *Bridges v. California*, *supra*, 314 US at 271, 86 L ed at 207, 159 ALR 1346.” (384 U.S. at 350.)

* * *

“‘Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.’ *Pennekamp v. Florida*, 328 US 331, 347, 90 L ed 1295, 1303, 66 S Ct 1029 (1946). But it must not be allowed to divert the trial from the ‘very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.’” (384 U.S. at 351.)

Attempts to use judicial hearings for purposes other than that for which they are intended has never been protected by the Constitution’s guarantee of the right of petition. Patentees’ uses of courts for anti-competitive purposes, even though their processes are ostensibly properly employed, has already been dealt with at length to demonstrate that such protection is not available. Malicious prosecu-

tion and abuse of process are not protected by the right of petition. Appellants submit that the reason stated in *Sheppard v. Maxwell*, *supra* (384 U.S. at 350), to the effect that acts which derogate from the purpose of the court system are not granted immunity, underlies the finding of liability in those cases as well as the patent-antitrust cases.

The First Amendment provides that there shall be no abridgement of the "right of the people . . . to petition the government for redress of grievances." By its terms such protection extends only to activity which seeks redress. Appellants do not believe that it can be said under any interpretation of the First Amendment that appellees sought redress of grievances. Appellants allege that they sought to prevent appellants from seeking or obtaining their own rights. Redress for appellees was an afterthought, at most a fringe benefit incidentally accruing to them because they chose to use the adjudicative processes of the courts and commissions to deter appellants from seeking rights.

The word redress means remedy of a grievance or vindication of a right by government. It does not contemplate actions which set forces into motion causing other individuals, rather than the state, to act. Appellants cannot believe that the Constitution protects the mere use of the facilities of government no matter how used or for what purpose. The use of such channels for purposes other than seeking of redress is not protected. Appellees have abused these channels by not using them for the purpose for which

the protection was designed. Whether appellees by their activities sought redress or something else is a question of fact. This case cannot be decided, in view of the allegations, solely upon the recognition that government facilities were used by appellees.

The courts, although holding legitimate rights to redress protectible regardless of the purpose involved, have never permitted the sham use of normal channels of petitioning government for some purpose other than petitioning for redress. To be immune appellees must be engaged in protectible activity. If activity done under the guise of petitioning is actually nothing more than a direct restraint upon competitors rather than an inducement of government action, it is sham. As such it is unprotected by the First Amendment and by the express terms of the *Noerr* case itself, as discussed below.

II. NOERR PROTECTION FROM THE SHERMAN ACT DOES NOT EXTEND TO ACTIVITY OSTENSIBLY INTENDING TO INDUCE GOVERNMENT ACTION, BUT ACTUALLY EFFECTING A DIRECT RESTRAINT UPON COMPETITORS.

It is appellants' position here that appellees' actions are subject to the antitrust laws even if it were found as a general proposition that employment of the courts' and commissions' processes for anti-competitive purposes constitutes political activity as defined in *Noerr*. Such a premise is unsupported by *Noerr*, and is positively denied by the patent-antitrust cases. Appellants assume it for the sake of argument only.

Appellants maintain that the manner in which the processes of the courts and commissions have been used in this case does not permit the summary disposition made by the court below. The threshold question must first be asked: In a forum where legitimate activity is protected by a rule of law, is activity which does not seek to use such a forum for its established purposes also protected? It is self-evident that the functions for which the processes of the P.U.C., the I.C.C. and the courts below were established and maintained are to render factual and legal determinations in accordance with prescribed procedural and substantive law. By the same token, it should be evident that the regulatory scheme involved may not legitimately be employed to deter appellants from filing applications and seeking rulings on matters which the scheme was made to regulate. No construction of the Sherman Act, or of *Parker v. Brown*, or of the First Amendment permits any other conclusion.

The Supreme Court in *Nocor* distinguished in clear language between protected attempts to influence the government and unprotected attempts directly to restrain trade. The court first defined activity meant to be exempt:

“We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.” (365 U.S. at 136.)

The court then qualified this position by including under the Sherman Act those activities which were not in fact attempts to influence or persuade government action:

“There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a *mere sham* to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices.” (365 U.S. at 144.) (Emphasis added.)

Appellants have alleged and can prove that appellees’ principal purpose was not to attempt to influence government. Appellants have alleged that appellees’ activities were attempts to interfere directly with their competitors’ ability to obtain operating rights and not to induce government to act. Appellants can establish that the conspiracy alleged was not a genuine effort to obtain government action as in *Noerr*.

In *Woods Exploration and Producing Co. v. Aluminum Company of America*, 36 F.R.D. 107 (S.D. Tex. 1963), the plaintiffs, as in the present case, alleged that the defendants had violated the Sherman Act by a conspiracy to misuse the processes of a quasi-judicial body, the Railroad Commission of the State of Texas. The defendants, it was charged, filed false reports with the commission which impaired the

plaintiffs' rights to engage in the business of producing, selling and transporting natural gas.

The defendants moved to dismiss the action on the grounds that *Noerr* protected the defendants' conspiracy. The court refuted this argument in language which is clear and salutary:

"The Court [in *Noerr*] found no basis for imputing to the Sherman Act a purpose to regulate *political* activity. . . . [Emphasis by the Court]

"First, is the conduct complained of in the instant case political in nature? If the defendants were enjoined from conspiring to submit false nominations to the Railroad Commission would they be deprived of any constitutional right to petition or participate in the Governmental process? The answer clearly seems to be that the defendants would only be prohibited from undertaking certain joint business behavior. *To subject them to liability under the Sherman Act for conspiring to restrict production or to eliminate a competitor would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in Noerr.*" (36 F.R.D. at 111.) (Emphasis added.)

A mere relationship between appellees and government agencies does not make appellees' activities protectible by *Noerr*. The question of *Noerr* protection is specific: Were the activities of appellees truly attempts to influence government to act (or not act), or were they in reality attempts to block competitors from receiving business rights?

At best, appellees' activities were only "ostensibly directed toward influencing government." They were not mainly engaged in the activity of "making a genuine effort to influence" government. These are questions of fact and degree. *Parker v. Brown* does not permit an antitrust violation to arise from regular and valid government action, irrespective of the manner or purpose for which the action was induced. But private action may violate the antitrust laws where the purpose is other than a genuine effort to induce government action. Under the antitrust laws, litigants such as appellants must be permitted to prove at trial that the damaging actions of private persons did not arise from a genuine effort to move government agencies.

Appellees have argued in the court below that language from *Pennington* precludes appellants from inquiring into the sham nature of appellees' activities. They have argued, in effect, that the following passage from *Pennington* completely negates the sham exception found in *Noerr*, and the application of the antitrust laws to sham activity:

"*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. The Court of Appeals, however, would hold the conduct illegal depending upon proof of an illegal purpose." (381 U.S. at 670). (Emphasis added.)

From the language quoted, it is clear that the "regardless of intent or purpose" immunity sought by appellees is operative only when there is an "effort

to influence public officials." *Noerr* makes it clear that not only must there be such an effort, but that it must be a *genuine* effort; a sham attempt will not suffice. Nothing in *Pennington* alters this analysis or negates the "sham" exception found in *Noerr*. On the contrary, the facts in *Pennington* revealed genuine efforts to influence government officials. The "intent or purpose" and "illegal purpose" which *Pennington* held did not render the acts of the conspiracy illegal was clearly their anti-competitive purpose and intent in combining to engage in political activity. However, it is critical to distinguish between anti-competitive purpose and intent on the one hand, and the genuineness of the means used to effect such purpose and intent on the other. Parties found to have anti-competitive intent in lobbying or influencing government are free of the Sherman Act as long as they truly seek to influence government. Parties who do not in fact lobby or genuinely attempt to cause government to act are not immune.

The circumstances surrounding the efforts of the appellees to lobby and influence government agencies within the bounds established by *Noerr-Pennington* must be scrutinized in order to determine the reality or the ostensibility of appellees' apparent efforts to influence government. Accordingly, appellants should be permitted to present evidence bearing on such issues. Appellees' actions in this case would not have been what they were had appellees agreed only to attempt to obtain favorable rulings from the agencies and courts. If such were appellees' true purpose,

they would not have included in their plan the unique features of a publicity campaign intended to convey in unmistakable terms to all competitors the prohibitive expenses of making applications. Nor would their plan have included the decision, made in advance, to oppose every application regardless of its merits. Attorneys' fees involved in carrying an application to the court of last resort are often greater than the worth of the rights themselves. The publicity campaign was particularly devastating because it brought the filing of applications for rights, transfers and registrations from a high level to a practical standstill. In short, appellees' activities demonstrate that their conspiracy was designed to prevent appellants from obtaining competitive rights *not* by defeating appellants on the merits before the commissions, but by directly deterring them from seeking such rights.

The means used by appellees in this case are distinguishable from those used in *Noerr* and *Pennington*. In *Noerr* and *Pennington* the defendants sought to use the functions of government for their anti-competitive purpose. They sought to *induce the government to act*. The railroads and large mine owners were found to have made a genuine effort to influence legislative and executive action. This was not disputed.

In the present case, such a dispute is at the heart of appellants' action. The courts and commissions, though not so intended, can be rendered useless to one group's opponents by the employment of an overwhelming combination of capital and personnel de-

voted to that purpose. Certainly *Noerr* does not protect the design of combined individuals to use government agencies in order to exclude competitors from those same agencies.

The constitutional and governmental protections sought to be established in *Noerr* simply are not at stake in this case. In *Noerr* defendants succeeded in restraining trade by successfully lobbying the executive and legislature of Pennsylvania. The railroad presidents, however, did not attempt to prevent the plaintiffs or other truckers from lobbying or otherwise petitioning and influencing government. In appellants' case, there is an elaborate system of procedural and substantive law to which every trucker is equally entitled. Most appellants and other class members were damaged because, when faced with certain opposition by appellees, they either did not seek rights or having sought them, were forced to compromise them with appellees or abandon them completely.

This critical element of blocking access to governmental agencies was not present in *Noerr*. Had it been, appellants do not believe that the defendants there would have been relieved of liability. In *Noerr* the court characterized the bitter fight between the railroads and truckers:

"In this particular instance, each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted in our political system, except to the extent that each group

has deliberately deceived the public and public officials.” (365 U.S. at 145.)

There is not present in appellees’ plan to discourage and prevent truckers from having complete access to regulatory bodies any characteristic which would permit such a plan to be one “normally accepted in our political system.” It is no more than a plan to harass and defeat competitors before they ever arrive at their hearings.

Both *Noerr, Pennington* and this action are based upon the actions of those who seek to achieve their aims by making use of government processes to some degree and in some context or other. There the similarity ends. Though it is true that government action was induced and at times resulted in decisions favorable to appellees, the violation complained of here is that appellees’ acts resulted from a plan to keep appellants and other class members from seeking the full redress to which they are entitled. The mere fact that judicial bodies acted when procedurally actuated by appellees was simply a function of the method they chose and not the principal purpose or means intended to restrain appellants’ competition.

III. APPELLEES’ RESTRAINTS UPON APPELLANTS’ ACCESS TO JUDICIAL HEARINGS CONSTITUTE ABRIDGEMENTS OF THE FIRST, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION. SUCH ABRIDGEMENTS SUPPORT A FINDING OF ANTITRUST VIOLATIONS AS WELL.

Appellants, like all other persons, are constitutionally entitled to free access to judicial bodies so long as such petitioning is not utilized for illegal or un-

constitutional purposes. *United Mine Workers v. Illinois State Bar*, U.S., 19 L. Ed. 2d 426 (1967). The courts must always be open and available at reasonable costs. *Conneau v. Geis*, 73 Cal. 176 (1887).

Where the federal courts and I.C.C. are concerned, appellants' right of access is guaranteed by the right of petition and free speech clauses of the First Amendment, and due process clause of the Fifth Amendment. Where the state courts and P.U.C. are concerned, appellants' rights are guaranteed by the First Amendment as incorporated in the Fourteenth Amendment, and by the due process clause, *Railroad Commission of California v. Pacific Gas and Electric Co.*, 302 U.S. 388 (1938), and equal protection clause, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), of the Fourteenth Amendment.

That appellants have in fact been denied free and reasonable access to the courts and commissions is not subject to dispute here. Appellants and other competitors of appellees have been effectively restrained, prohibited, and deterred from the judicial hearings to which they are entitled by the methods enumerated in the complaint, as discussed above. The denial of these hearings is an accomplished fact. In any event, such denials must be accepted as true for purposes of this appeal.

The only significant remaining question is whether the abridgements of appellants' rights were accomplished by "state action". The law has long held that private parties can vest themselves with the indicia and power of governmental authority sufficient to

make their activities subject to the restraints imposed by the First and Fourteenth Amendments. In *Marsh v. Alabama*, 326 U.S. 501 (1946), where private owners of a "company town" were charged with unconstitutional restraints upon free speech, press and religion, the court held the owners accountable to the First Amendment.

"Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. (citing cases) Thus the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation. And, though the issue is not directly analogous to the one before us we do want to point out by way of illustration that such regulation may not result in an operation of these facilities, even by privately owned companies, which unconstitutionally interferes with and discriminates against interstate commerce." (326 U.S. at 505.)

Any group which assumes the prerogatives and functions of government will be subject to prohibitions directed to the state itself. *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953). Private invocation of action by state agencies resulting in the deprivation of constitutional rights is state involvement sufficient to hold the private parties

liable, *United States v. Guest*, 383 U.S. 745 (1966); *United States v. Lester*, 363 F. 2d 68 (6th Cir. 1966).

In the present case, appellees have deprived appellants of their constitutional rights by effectively substituting their conspiracy for legitimate state regulation. Through their large-scale economic and procedural cooperation, appellees have successfully imposed their combination upon the agencies and courts and have thereby determined which carriers shall, and which shall not, obtain certificates, transfers, registrations, and other carriage rights. Their massive protests in the P.U.C. have as a procedural matter disrupted and disoriented hearings to the extent that such hearings have become meaningless as the safeguards of appellants'—and the general public's—carriage rights. Such a misuse of the offices of the state constitutes in itself a denial of procedural due process. It also constitutes a denial of substantive due process with regard to the right to petition and free speech. By effectively turning the state's regulatory scheme into a single-edged sword against appellants and other competitors, appellees' actions further constitute a denial of equal protection of the laws under the Fourteenth Amendment.

The fact that appellees' conspiracy has not operated upon competitors in the form of official state action does not render their conspiracy immune to state action principles. Their combination cannot be permitted to infringe appellants' rights through either direct or indirect action. In *United Mine Workers v. Illinois State Bar*, supra, the Supreme Court said:

“The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such.” (..... U.S. at, 19 L. Ed. 2d at 430.)

In this case, appellees’ conspiracy is especially subject to state action principles since the rights which they have sought to control and regulate are also public rights in which the state has a paramount interest. The common carrier rights at stake in this case are designed to serve the public need, without discrimination. Appellants and appellees have been granted rights by state and federal agencies to carry out a state controlled scheme of operation. Holders of these rights must regard them and operate them much as public utilities, and are to that degree extensions of the state itself. Common carriers are thus vested with duties of the state, and as such are even more clearly than other private concerns subject to the state action principles required for the application of constitutional safeguards. *Public Utilities Commission v. Pollack*, 343 U.S. 451 (1952).

Appellants raise these constitutional issues here not for the purpose of vindicating their constitutional rights, although such may be possible. Appellants’ purpose is twofold. First, appellants emphasize their earlier argument that the First Amendment considerations raised in *Noerr* do not protect appellees. On the contrary, it is appellants, not appellees, who have been deprived of such rights. Appellees have at no

time been denied access to the courts or agencies. Nor would the relief sought by appellants here deprive them in any manner from access for legitimate purposes.

Second, appellants believe that appellees' violations of competitors' constitutional rights underlines and supports a finding of antitrust violations as well. The antitrust laws are violated whenever individuals combine to restrain trade. Whether such activities also violate other laws or the Constitution does not make the antitrust violation greater once the violation is found, but can assist the court in finding such a violation.

Thus, where a patentee violates the patent laws of the United States by fraudulently obtaining a patent, an antitrust violation results if the defendant knowingly uses the patent to restrain the trade of a competitor. *Food Machinery and Chemical Corp. v. Walker Process Equipment, Inc.*, 335 F. 2d 315 (7th Cir. 1964).

Where a public official combines with a private contractor to violate the bribery laws of the state, such bribery if it injures a competitor is a violation of the antitrust laws. *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F. 2d 851 (9th Cir. 1965).

Where competitors combine to make defamatory statements about a plaintiff in violation of the defamation laws, an antitrust violation results because of injury to plaintiff's business. *Northeast Airlines, Inc. v. World Airways, Inc.*, 1967 Trade Cas., page 83,971

(D. Mass. 1967); *Atlantic Heel Co. v. Allied Heel Co.*, 284 F. 2d 879, 884 (1st Cir. 1960).

In short, if constitutional rights are violated, the source of the violation may delineate antitrust violations as well. If anti-competitive considerations are present, the Sherman Act will apply.

CONCLUSION

For the reasons stated, it is respectfully submitted that the district court's order dismissing appellants' cause of action be reversed, and the cause remanded for trial.

Dated, San Francisco, California,

July 5, 1968.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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